FEDERAL
ANTI-TRUST DECISIONS

CASES DECIDED IN UNITED STATES COURTS

ARISING UNDER, INVOLVING, OR GROWING
OUT OF THE ENFORCEMENT OF

THE FEDERAL ANTI-TRUST ACTS

(Act of July 2, 1890; 26 Stat., 209)
(Act of Aug. 27, 1894; 28 Stat., 570)
(Act of Feb. 12, 1913; 37 Stat., 667)
(Act of Oct. 15, 1914; 38 Stat., 730)

INCLUDING A FEW SOMEWHAT SIMILAR DECISIONS
NOT BASED UPON THOSE ACTS

1890-1917

COMPILED BY
JOHN L. LOTT
AND
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UNDER THE DIRECTION OF THE ATTORNEY GENERAL

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CASES REPORTED IN THIS VOLUME.

(VOLUME 6.)

FEDERAL ANTI-TRUST DECISIONS.

VOL. 6.

1914–1917

UNITED STATES *v.* UNITED STATES STEEL CORPORATION ET AL.[a]

(District Court, D. New Jersey. June 3, 1915.)

[223 Fed. Rep., 55.]

MONOPOLIES 24—ANTI-TRUST ACT—SUIT TO RESTRAIN VIOLATION—RELIEF.—The purpose of a suit in equity by the United States to prevent and restrain violations of Sherman Anti-Trust Act July 2, 1890, c. 647, 26 Stat. 209 (Comp. St. 1913, § 8823 et seq.), brought under section 4 of the act, is to restrain present and prevent future violations through the power of injunction; but where the evil effects of past undue restraint or monopoly of trade continue to be effective and harmful, and if to prevent continuance of such wrongs a dissolution of the unlawful combination is necessary to make the relief effective, the court has power to decree such dissolution; but, unless so necessary, such power will not be exercised.[b]

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 17; Dec. Dig. 24.]

MONOPOLIES 24—ANTI-TRUST ACT—VIOLATION.—The United States Steel Corporation was organized by the consolidation of a number of large steel-making concerns in 1901. During the ensuing ten years previous to suit it at all times had active and increasing competition. It manufactured about half of the steel produced in the

[a] The case is pending in the Supreme Court on the appeal of the United States.

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United States, and its proportionate part during that time decreased in nearly all lines. The testimony, largely of competitors and customers, showed that it has been fair to competitors, has steadily increased its production, and that, while competition has been close, it has abstained from radical cutting of prices, and has usually publicly announced its prices in advance and maintained the same; that with the exception of a short intermediate period none of its prices have been the result of agreement with other manufacturers, but all have been independently adopted, have been reasonable and conservative, and have helped to keep the market steady. Several competitors testified that they did not believe it possible for it to force them out of business or obtain a monopoly of the steel-making industry. *Held*, that such evidence was insufficient to establish any purpose, either in the organization of the corporation or in the conduct of its business, to create a monopoly or to unduly restrain trade to the detriment of the public, in violation of Sherman Anti-Trust Act July 2, 1890.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 17; Dec. Dig. 24.]

MONOPOLIES 12—SHERMAN ANTI-TRUST ACT—VIOLATION.—An important purpose of the organization of the Steel Corporation was the building up of an export trade. Such trade in iron and steel at that time was sporadic, consisting of dumping products in foreign countries when the domestic market was overcrowded, and on the whole was not profitable. The Steel Corporation, by reason of its large capital and organization, for the first time created and maintains a regular and permanent market, by organizing a subsidiary corporation to sell the large line of diversified products, manufactured by its associate subsidiary companies, such as must be kept in stock, sending the same for distribution to the 300 warehouses which it established and maintains in 60 different countries, sending to each the things most in demand. In this manner it increased the value of its foreign trade from $31,000,000 in 1904 to $91,000,000 in 1913, controls from 80 to 90 per cent of such trade in iron and steel, and has been able to command better prices, although domestic prices have been generally reduced. *Held*, that such action was not in restraint of foreign commerce in violation of Anti-Trust Act of July 2, 1890, but was in aid of it by legitimate [56] methods; such trade having in fact been thereby largely created, and not taken from others.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 10; Dec. Dig. 12.]

MONOPOLIES 24—ANTI-TRUST ACT—COMBINATIONS IN RESTRAINT OF TRADE.—The history of the organization of the United States Steel Corporation in 1901 reviewed, and *held* not to evidence any intention or purpose on the part of the organizers to monopolize or re-

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strain trade, especially in view of the fact that no such thing was attempted, but to show that the consolidation was the natural outgrowth of the changing conditions in the trade in its transition from iron to steel, and the tendency to integrate the plants back to ore supply and forward to the finished products, and to secure greater economy of management and large capital necessary to meet the demands of structural contracts and the development of export trade.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 17; Dec. Dig. 24.]

MONOPOLIES 17, 26—SHERMAN ANTI-TRUST ACT—SUIT FOR VIOLATION—AGREEMENT IN RESTRAINT OF COMPETITION.—At a time of panic and threatened serious financial disturbance representatives of a number of the largest steel manufacturers, who were competitors, met and after discussion came to an informal agreement or understanding to maintain prices for their own protection and the protection of customers who had stocks on hand. At later meetings committees were appointed, who considered and assented to specific prices to be maintained by each company until it should find reason to change them, in which case it was understood that it should notify the others, that another meeting might be held. These tacit agreements were more or less observed by the parties until normal conditions were restored, although there were many other manufacturers who did not take part in nor regard them. *Held* that, while no formal words of contract were used, the understanding amounted to an agreement in restraint of competition, in violation of Anti-Trust Act July 2, 1890, § 1 (Comp. St. 1913, § 8820), but that such agreement would not justify the court in dissolving participating corporations on a bill filed by the Government after it had ceased to be observed.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. §§ 13, 17; Dec. Dig. 17, 26.]

Per Woolley, Circuit Judge, concurring.

MONOPOLIES 12—ANTI-TRUST ACT—VIOLATION—"RESTRAINT OF TRADE."—Whether a manufacturing combination is one in "restraint of trade," or has monopolized or attempted to monopolize commerce, in violation of Sherman Anti-Trust Act July 2, 1890, §§ 1, 2 (Comp. St. 1913, §§ 8820, 8821), depends upon the inherent nature or effect of the combination, the evident purpose of its acts, or the intent to be inferred from the extent of control secured over the industry, the method by which such control has been brought about, and the manner in which it has been exerted, resulting in prejudice to the public interests by unduly restricting competition or unduly obstructing the course of trade.

Statement of the case.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 10; Dec. Dig. 12.

For other definitions, see Words and Phrases, First and Second Series, Restraint of Trade.]

CORPORATIONS 306—LEGALITY OF ORGANIZATION—LIABILITY OF DIRECTOR.—The fact alone that a corporation after its organization paid for property purchased with stock and then elected the seller a member of its [57] board of directors does not render him responsible for any alleged illegality in its organization.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1457, 1458; Dec. Dig. 306.]

MONOPOLIES 20—ANTI-TRUST ACT—VIOLATION.—A corporation, although a combination of other large manufacturing corporations and having a very large capital, cannot be said to be inherently a monopoly, where during ten years its increase in percentage of business is much less than that of its principal competitors.

[Ed. Note.—For other cases, see Monopolies, Dec. Dig. 20.]

MONOPOLIES 20—ANTI-TRUST ACT—VIOLATION.—That the United States Steel Corporation was formed by combining as constituent members corporations which were themselves large combinations, recently formed, and which had demonstrated their power to unlawfully monopolize trade in their several lines of business, warrants a finding that the organizers of the Steel Corporation intended to unite and perpetuate such monopolies and combined for that purpose. The corporation itself, however, neither attempted nor possessed the power alone to do the unlawful things intended by its formation, but it unlawfully combined with competitors, by means of pools and informal understandings, to restrain trade by controlling prices.

[Ed. Note.—For other cases, see Monopolies, Dec. Dig. 20.]

MONOPOLIES 24—ANTI-TRUST ACT—SUIT FOR VIOLATION—RELIEF.—A corporation which is not in and of itself a monopoly nor a combination in restraint of trade, within the meaning of Anti-Trust Act July 2, 1890, §§ 1, 2 (Comp. St. 1913, §§ 8820, 8821), should not be dissolved because it may in the past have combined with others to restrain trade by controlling prices, where such unlawful acts have been discontinued.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 17; Dec. Dig. 24.]

In equity. Suit by the United States against the United States Steel Corporation and others. Decree for defendants.

J. M. Dickinson, of Chicago, Ill., and *Henry E. Colton*, of Washington, D. C., for the United States.

Lindabury, Depue & Faulks, of Newark, N. J. (*Joseph H. Choate*, of New York City, *John G. Johnson*, of Philadelphia, Pa., *Francis Lynde Stetson*, of New York City, *David A. Reed*, of Pittsburgh, Pa., *Raynal C. Bolling*, of New York City, *Cordenio A. Severance*, of St. Paul, Minn., and *Richard V. Lindabury*, of Newark, N. J., of counsel), defendants, United States Steel Corporation and others.

Murray, Prentice & Howland, of New York City (*George Welwood Murray*, of New York City, of counsel), for defendants Rockefeller.

Kellogg & Emery, of New York City (*Frederic R. Kellogg* and *Chester W. Cuthell*, both of New York City, and *J. D. Armstrong*, of St. Paul, Minn., of counsel), for defendants, Louis W. Hill and others.

Before BUFFINGTON, HUNT, MCPHERSON and WOOLLEY, Circuit Judges.

BUFFINGTON, Circuit Judge:

We may say in advance that all the members of this court are in agreement as to the decree that will be entered in this case, although we are not in complete accord concerning every step by which that result is reached.

[58] The subject-matter of the litigation is of such magnitude and complexity, and the record is of such size, that the effort to set bounds to this discussion has not been easy. So many questions, large or small, were laid before us in the oral argument, and so many are considered in the extended briefs of counsel, that we can not hope to give them all a place in such discussion. But we trust that one or other of the two following opinions will pay adequate attention to the most important, with the result of avoiding repetition as far as possible, while presenting somewhat different aspects of the controlling principles by which the case must be decided. Without a needless expansion of the discussion, it would scarcely be practicable to take up each detail for the

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purpose of pointing out just where we are in complete agreement, and where certain divergencies of view exist. We have thought it best, therefore, to adopt the course referred to, believing that the two opinions will cover the whole case and will also sufficiently indicate the reasons that have led us to a common conclusion.

This case—a proceeding under the Sherman Anti-Trust Law—is largely one of business facts. The construction of that statute has been settled by the Supreme Court. *Standard Oil Co.* v. *United States*, 221 U. S. 1, 31 Sup. Ct. 502, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912D, 734; *United States* v. *American Tobacco Co.*, 221 U. S. 106, 31 Sup. Ct. 632, 55 L. Ed. 663. That construction has been applied in this circuit in the *Keystone Watch case* (D. C.) 218 Fed. 502, and the *Powder Trust case* (C. C.) 188 Fed. 127. It follows, therefore, that our duty is largely one of finding the facts and to those facts applying settled law. The act in question provides:

"SECTION 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract, or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court." Comp. St. 1913, § 8820.

"SEC. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any person or persons to monopolize, any part of the trade or commerce among the several States or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court." Section 8821.

"SEC. 4. The several Circuit Courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be en-

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joined and otherwise prohibited. When the parties complained of shall have been duly notified of such petition, the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises." Section 8823.

"SEC. 7. Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any Circuit Court of the United [59] States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee." Section 8829.

When the Constitution of the United States conferred on Congress the right "to regulate commerce with foreign nations and among the several States," its purpose was not to fetter but to further and foster trade. This constitutional purpose to promote lawful trade by protecting it from unlawful restraint is avowed in the title of the act, viz, "An act to *protect* trade and commerce *against* unlawful restraints and monopolies," and, as held by the Supreme Court (*Standard Oil case, supra*), "one of the fundamental purposes of the statute is to protect, not to destroy, rights of property."

[1]Now, unlawful restraints of trade are of three kinds, past, present, and future. As to present and future restraints, Congress by section 4 empowered "the Attorney General to institute proceedings in equity to prevent and restrain such violations," and to that end invested the courts "with jurisdiction to prevent and restrain violations of this act." The jurisdiction here conferred is the chancery power of injunction, a power which is used to restrain present wrongs or prevent threatened ones. This is shown by the act providing even for temporary preliminary restraining orders while the case is being heard. "The function of an injunction is to afford preventive relief, not to redress alleged wrongs which have been committed already." *Lacassagne v. Chapuis*, 144 U. S. 119, 12 Sup. Ct. 659, 36 L. Ed. 368, cited in *Black v. Jackson*, 177 U. S. 363, 20

Sup. Ct. 648, 44 L. Ed. 801. Applying that general principle, the Supreme Court of the United States, in the Standard Oil case, *supra*, citing *Swift* v. *United States*, 196 U. S. 375, on page 377, 25 Sup. Ct. 276, 49 L. Ed. 518, said:

"It may be conceded that ordinarily, where it was found that acts had been done in violation of the statute, adequate measure of relief would result from restraining the doing of such acts in the future."

In view of what was held by this court in the Powder case, *supra*, it scarcely need be again said by us that where the evil effects of past undue restraint or monopoly continue to be effective and harmful when the proceeding is begun—that is, where "the inherent nature of the contemplated acts" is such as to bring about their continuance and repetition, or where, to use the expressive language of the Supreme Court in the *Standard Oil case*, 221 U. S. 75, 31 Sup. Ct. 502, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912D, 734, a "perennial violation" of the act exists—the jurisdiction to restrain present and prevent future violations vests under this section, and if, to prevent continuance of such continuing wrongs a dissolution of the unlawful combination is necessary to make the relief effective, the original combination will be dissolved. That power was exercised by this court in the Powder case, *supra*, and by the Supreme Court in the Standard Oil case, *supra*, and the Tobacco case, *supra*. In the Keystone Watch case, *supra*, this power to dissolve was not exercised, the court there saying, at page 519 of 218 Fed.:

"But we see no sufficient evidence that the public interest requires us to break up the existing corporate entity. *United States* v. *Great Lakes Towing* [60] *Co.* (D. C.), 208 Fed. 746. The record satisfies us that the watch case business is not suffering from the absence of live and healthy competition, and, except in the directions already mentioned—namely, the retail sales of the Howard watch and the policy of boycotting—we think the court is not called upon to interfere."

The reason why the power to dissolve was exercised in the Standard Oil case, namely, that it was a violation continuing up to the filing of the petition, is pointed out by the Supreme Court in these words:

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"But in a case like this, where the condition which has been brought about in violation of the statute *in, and of itself*, is not only a *continued* attempt to monopolize, but also a monopolization, the duty to enforce the statute requires the application of broader and more controlling remedies," and is justified because "the acts and dealings established by the proof operated to destroy *the 'potentiality of competition,'* * * * but also to be an attempt to monopolize and a monopolization bringing about a *perennial violation* of the second section."

To this we may add that, while the power to dissolve was for the same reason exercised by us in the Powder case, yet it will be observed there was in that case a refusal to enjoin as to certain defendants, the court saying:

"As the only relief we can grant in this proceeding is injunctive, the petition must be dismissed as to any defendant who was not violating the law, or threatening to violate it, when the suit was commenced."

Indeed, in each of the cases, the injunction was granted, not to enjoin past violations or because there had been violations in the past, but because such violations were continuing when the bill was filed. It will therefore appear that by this act a comprehensive plan of relief was mapped out "to *protect* trade and commerce *against* unlawful restraints and monopolies": First, a criminal prosecution by the Government under sections 1 and 2 for all violations, past and present; second, an injunction in equity, on complaint of the Attorney General, under section 4, against all present or threatened violations of the act; and, third, a civil suit under section 7 by any one injured against any violator of this act.

In pursuance of the power vested in him by section 4 above quoted, George W. Wickersham, then Attorney General, of the United States, on October 26, 1911, filed this petition. Without entering into detail, we may say it prays that the Federal Steel Company, organized in 1898; the Carnegie Steel Company, organized in 1900; the Carnegie Company of New Jersey, organized in 1900, which held the stock of the Carnegie Steel Company of Pennsylvania; the American Steel & Wire Company, organized in 1899; the National Tube Company, organized in 1899; the National Steel Com-

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pany, organized in 1899; the American Tin Plate Company, organized in 1898; the American Steel Hoop Company, organized in 1899; the American Sheet Steel Company, organized in 1900; and the United States Steel Corporation, which acquired the stocks of said companies, be held unlawful monopolies, and that the United States Steel Corporation, and each and all the said units composing it, be decreed to be illegal and be dissolved, and that their officers and stockholders be perpetually enjoined.

Seeing, then, that the remedy here sought is that of both dissolution [61] and injunction, we turn to the statute to ascertain on what state of facts dissolution should be decreed or injunction awarded.

The words of the statute are few and clear. Manifestly the trade which it seeks to protect is the natural and normal buying and selling of property, and the protection it gives is by preserving to all engaged in such trade this trade right of natural and normal buying and selling, free from unlawful restraints and monopolies. For, it will be observed, the statute is not directed against all restraints and monopolies, but "against unlawful restraints and monopolies." This naturally raises the practical question: What are the lawful restraints and monopolies which the statute impliedly does not forbid, and what are the unlawful restraints and monopolies which it not only expressly forbids, but enjoins and indeed makes criminal? In the late case of *Nash* v. *United States* (229 U. S. 373, 33 Sup. Ct. 781, 57 L. Ed. 1232), the Supreme Court, referring to its former decisions, clearly defines what the statute forbids and does not forbid as follows:

> "Those cases may be taken to have established that only such contracts and combinations are within the act as, by reason of intent or the inherent nature of the contemplated acts, prejudice the public interests by unduly restricting competition or unduly obstructing the course of trade."

The present case involves the legality, not of a contract, but of a combination; that is, the legality of the United States Steel Corporation, which the petition asks to have dissolved. Therefore, applying the foregoing definition of the Supreme Court to the case in hand, the basic question

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for us to decide is one of fact, namely, whether the union of the several defendant companies in the United States Steel Corporation "prejudices the public interests by unduly restricting competition or unduly obstructing the course of trade." The public interests thus prejudiced consist of—First, competitors in trade; second, the purchasing public; and, third, the general public. For example, if this Steel Company was in any way guilty of unfair business competition, if it was guilty of such conduct as to unfairly force a competitor out of the steel business, or if it unfairly prevented those who wanted to go into the steel business from doing so, then the Steel Company was, in the judgment of the Supreme Court, prejudicing the public interests by unfairly driving individuals out of business or preventing them from entering it, and it was also injuring the public by unduly restraining trade. So, also, if this Steel Company was restricting output in order to exact unfair prices; if it was buying up competing plants and dismantling them to needlessly restrict output; if it was by reason of its controlling power furnishing the public with inferior goods; if it was using its power to needlessly and unfairly reduce wages; if it was seeking to deceive purchasers by a false appearance of competition, when in fact it owned or controlled such seeming competition—then it was prejudicing, not only that portion of the public which desired to buy steel, but the public interests generally by unduly obstructing the course of trade and thereby preventing the steel business from moving in its natural and normal channel.

A study of the various anti-trust cases shows that such unfair, prejudicial acts as we have thus instanced have been found where the Sher[62]man Law has been held to have been violated. Thus, in the *Standard Oil case, supra*, 221 U. S. at page 76, 31 Sup. Ct. at page 521 (55 L. Ed. 619, 34 L. R. A. [N. S.] 834, Ann. Cas. 1912D, 734), the Supreme Court, referring to the conduct of that company toward its competitors, says:

"We think no disinterested mind can survey the period in question without being irresistibly driven to the conclusion that the very genius for commercial development and organization which it would seem

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was manifested from the beginning soon begot *an intent and purpose to exclude others*, which was frequently manifested by acts and dealings wholly inconsistent with the theory that they were made with the single conception of advancing the development of business power by usual methods, but which, on the contrary, necessarily involved the intent to *drive others from the field* and *to exclude them from their right to trade*, and thus accomplish the mastery which was the end in view. * * * The exercise of the power which resulted from that organization fortifies the foregoing conclusions, since the development which came, the acquisition here and there which ensued of every efficient means by which competition could have been asserted, the slow, but resistless, methods which followed, by which *means of transportation were absorbed* and brought under control, the system of marketing which was adopted by which the country was divided into districts and the trade in each district in oil was turned over to a designated corporation within the combination, and *all others were excluded*, all lead the mind to a conviction of a purpose and intent which we think is so certain as practically to cause the subject not to be within the domain of reasonable contention."

Like unfair conduct toward competitors marked the *Tobacco case*, 221 U. S. 106, 31 Sup. Ct. 632, 55 L. Ed. 663. It was there said:

"The history of the combination is so replete with the doing of acts which it was the obvious purpose of the statute to forbid, so demonstrative of the existence from the beginning of a purpose to acquire dominion and control of the tobacco trade, not by the mere exertion of the ordinary right to contract and to trade, but by methods devised in order to monopolize the trade *by driving competitors out of business*, which were ruthlessly carried out upon the assumption that to work upon the fears or play upon the cupidity of competitors would make success possible. We say these conclusions are inevitable, not because of the vast amount of property aggregated by the combination, not because alone of the many corporations which the proofs show were united by resort to one device or another. Again, not alone because of the dominion and control over the tobacco trade which actually exists, but because we think the conclusion of a wrongful purpose and illegal combination is overwhelmingly established by the following considerations: (a) By the fact that the very first organization or combination was impelled by *a previously existing fierce trade war, evidently inspired by one or more of the minds which brought about and became parties to that combination.* (b) Because, immediately after that combination and the increase of capital which followed, the acts which ensued justify the inference that the intention existed to use the power of the combination as a vantage ground to further monopolize the trade in tobacco *by means of trade conflicts*

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designed to injure others, either by driving competitors out of the business or compelling them to become parties to a combination."

It will also be seen the evidence of intended monopoly and throttling of competition was found in the buying up of plants not commercially needed and then dismantling them. Thus, in the *Tobacco case, supra*, 221 U. S. at pages 182, 183, 31 Sup. Ct. at page 649 (55 L. Ed. 663), it was said:

"We think the conclusion of wrongful purpose and illegal combination is overwhelmingly established by the following considerations: * * * By [68] persistent expenditure of millions upon millions of dollars *in buying out plants, not for the purpose of utilizing them, but in order to close them up* and render them useless for the purposes of trade."

Taking steps to keep others from entering the business is also recited as a violation of the act:

"The conclusion of wrongful purpose and illegal combination is overwhelmingly established by the following considerations: * * * By the gradual absorption of control over all the elements essential to the successful manufacture of tobacco products, and placing such control in the hands of seemingly independent corporations *serving as perpetual barriers to the entry of others into the tobacco trade.*"

So, also, in the *Keystone Watch case, supra*, pages 510 to 512 of 218 Fed., unfair conduct toward competitors constituted the violation of the statute. Speaking for this court, Judge McPherson there said:

"Beginning in 1904, or thereabouts, it made several attempts—perhaps not very numerous, but numerous enough—that showed a definite purpose to restrain trade by attempting to fix and maintain prices, and by using a species of boycott or blacklisting in order to lessen the trade of its rivals. We shall not stop to detail the attempts of this character that were made during the period from 1904 to 1910, because the policy and system to which we refer were manifested with unmistakable distinctness in the latter year, and were carried on with vigor and persistence. * * * Now, what the defendant company did was either to close these already existing and already utilized outlets, or to narrow them materially, so far as the [watch] cases of its competitors were concerned; and we think the proposition need not be discussed that this was pro tanto a direct and unlawful restraint of trade."

So, also, amongst other factors which tended to show a violation of the statute, reference was made in the *Tobacco case*, 221 U. S. at page 174, 31 Sup. Ct. at page 646 (55 L.

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Ed. 663), to the maintenance of a false appearance of competition:

"The record indisputably discloses that after this merger the same methods which were used from the beginning continued to be employed. Thus, it is beyond dispute * * * that the new company has besides acquired control of eight additional concerns, the business of such concerns being now carried on by four separate corporations, all absolutely controlled by the American Tobacco Company, although the connection as to two of these companies with that corporation was long and persistently denied."

In the Powder case, oppression of competitors existed and was thus referred to at page 140 of 188 Fed.; Judge Lanning, speaking for this court:

"The association of manufacturers of powder and other explosives had probably never been stronger than it was in February, 1902, when the change in the management of the Dupont works took place. It had for years arbitrarily fixed prices in the different parts of the United States, waging a disastrous warfare against competitors until they were coerced into terms satisfactory to the association or brought into the association. * * * Measures were often devised to limit the output of the members of the association and to crush competition by manufacturers not members of the association."

[2] The tests of the violation of this statute having then, as we have seen, been adjudged by the Supreme Court (*Nash* v. *United States*, *supra*), namely, whether the acts in question "prejudice the public interests by unduly restricting competition or unduly obstructing the course of trade," it would appear the questions of fact for us to determine from the evidence are these:

[64] First. Was the Steel Corporation, when this bill was filed in 1911, prejudicing the public interests by unduly restricting competition, or unduly obstructing the course of the steel and iron trade, between the States, or with foreign nations? If this question be answered "Yes," the law was then being violated, and an injunction should issue to restrain present and future violations.

Second. Did the Steel Corporation, when it was formed in 1901, either by the intent of those forming it, or by the inherent nature of that company's contemplated acts, prejudice the public interests by unduly restricting competition

or unduly obstructing the course of the steel and iron trade, interstate or foreign? If this question be answered "Yes," then the law was violated, and the Steel Corporation must be adjudged originally illegal. If illegal, it must be dissolved, because only thus can its inherent nature be prevented from continuing to work further violations of the statute. On the other hand, if these questions are negatived, then the Steel Corporation should not be dissolved, but permitted to pursue that usual course of trade which it was the purpose, as we have seen, of this statute to protect. It will thus be seen that, as stated at the outset, this case is practically one of business facts.

Turning, then, to the first question, let us address ourselves, first, to the iron and steel trade here in the United States, and inquire whether the evidence satisfies us that the Steel Corporation, when this bill was filed in 1911, was then prejudicing the public interests by unduly restricting or unduly obstructing the steel and iron business of the United States. In considering that question, a number of fields of inquiry naturally suggest themselves. Had this company in 1911 a monopoly of the steel and iron trade of the country? What had been and was then its business conduct towards its competitors? Was it fair or unfair? Had it forced or was it forcing others out of the steel trade by unfair conduct? Had it prevented others from entering it? Was it then exacting or had it exacted from the public undue prices for its products? Had it lowered the character of its product? Had it cut down or was it cutting down, its output so as to restrict proper supply? Had it taken advantage of its power to unduly reduce wages? All these, as we have seen from the Standard Oil, the Tobacco, the Powder, and Keystone Watch cases, were inquiries by which the question could be determined whether the Steel Corporation was acting, as the Supreme Court said in the *Standard Oil case*, 221 U. S. at page 58, 31 Sup. Ct. at page 515 (55 L. Ed. 619, 34 L. R. A. [N. S.] 834, Ann. Cas. 1912D, 734) with "the legitimate purpose of reasonably forwarding personal interest and developing trade," or, on the other hand, "with the intent to do wrong to the general public and to limit the right of individuals."

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Now as trade is a contest for it between different persons, and the gain of that trade by one means the loss of it to another, it follows that the person who best knows whether the man who gained it, gained it fairly, is the man who lost it. If there is monopoly, if unfair business methods exist, if the course of trade and fair trading is throttled, we can find proof of it from business competitors. Trade competitors are the first to feel the pinch of unequal, unfair, and undue restraint of the [65] natural and normal course of trade. Being the first to suffer, they are the keenest to condemn. Turning, then, to this Steel Corporation's competitors, let us decide from the proofs whether the Steel Corporation had, when this bill was filed, a monopoly of the iron and steel business of the United States.

We turn, first, to finished rolled products, because they are the basic supply to the vast number of varied industries throughout the country dependent thereon. If all these minor industries are dependent on a monopolized source of an indispensable base, we can say, without going further, that not only such industries but the general public are prejudiced, for, as said and held by the Supreme Court in the Tobacco case, wrongful purpose and illegal combination are established "by the gradual absorption of control over all the elements essential to the successful manufacture of tobacco (steel) products." Indeed, the importance of such basic supply in the dependent steel trade is shown by the fact that in the congressional investigation of the Steel Corporation, made by Congress by resolution of January 28, 1905, hereafter referred to, the second inquiry there ordered was:

"To what extent said corporation and its associates control the output and prices of the finished products made by independent companies, dependent upon it for their raw materials?"

What, then, are the facts in reference to finished rolled products? In that regard the evidence (see summary in Statement of Case, page 412) is that in 1911 the finished rolled product—which excludes pig iron, steel castings, and ingots—of the United States (using in this opinion, when quoting figures, round numbers, and by the term "Steel Company," or "Steel Corporation," meaning the United

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States Steel Corporation) was 19,000,000 tons. Of this tonnage the competitors of the Steel Corporation produced 54 per cent, or 10,300,000 tons, while the Steel Corporation made 8,700,000 tons; but not only did its competitors produce in 1911 the major part of the country's finished rolled product, as above, but judging from the past, the present proportionate lead of the competitors bids fair to increase. In 1901, when the Steel Company was formed, the total finished roll product of the United States was 13,000,000 tons. This was substantially divided between 49.9 per cent, made by its competitors, and 50.1 per cent by the Steel Company. While both together have since increased the Nation's product from 13,000,000 to 19,000,000 tons, yet of this 6,000,000 increase its competitors produced 3,400,000 tons to the Steel Company's 2,600,000 tons.

Taking steel ingots, another basic supply on which great numbers of finishing industries are ultimately dependent, we find (Statement of Case, page 406) that while in 1901 of the 13,000,000 tons of the total American ingot production, the competitors of the Steel Company only made 4,500,000 tons, as against the Steel Company's 8,500,000, yet by 1911, in the country's vast increase from 13,000,000 to 24,000,000 tons, the competitors had increased their production by 6,500,000 tons, while the Steel Company had only increased 4,500,000. In other words, while the Steel Company produced in 1901, 66 per cent of the country's ingot production, it was producing but 54 per cent in 1911.

In pig iron, the basic supply of foundries, finishing mills, and other [66] dependent industries, the relations were slightly the other way. In 1911, out of a total cast of 22,000,000 tons of pig iron (S. C. page 405), only 12,000,000, or 54.8 per cent were made by competitors of the Steel Company, as against 9,000,000, or 56.8 per cent, made by such competitors in 1901, out of a total of 16,000,000—a decrease of 2 per cent.

These facts and figures bearing on basic supplies of the country's dependent iron and steel industries satisfy us that there is no monopolistic control anywhere of such basic factors as ingots, pig iron, and finished rolled products, and the

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testimony hereafter referred to satisfies us that any substantial producer of such basic articles can, by selling such products at such lower price as he sees fit, compel all producers of such supplies, including the Steel Corporation, to also lower their prices. So, also, monopolistic control of finished steel articles in wide use would be a matter of grave public prejudice. Taking, for example, wire production, in which, through fencing, nails, and the great range of articles made from wire products, so many people are interested. When the Steel Corporation was formed in 1901, of the 9,000,000 kegs of wire nails then made in the United States, the competitors of the Steel Corporation made 3,000,000 kegs, and the Steel Corporation 6,00,000. By 1911, the country's production had grown to 13,000,000, but of the 3,500,000 of increase the Steel Corporation made 1,000,000 as against its competitors making 2,500,000. The net result was that, when this bill was filed, the Steel Corporation's competitors had 6,500,000 and the Steel Corporation 7,000,000 of the country's total production of 13,500,000 kegs. So of wire netting, fencing, and other wire products in general use. The general average of the Nation's total production made by competitors when this bill was filed was 78 per cent. It will be seen that in this particular respect, due, no doubt, as we shall see, to the growth of its foreign trade in wire products, the Steel Corporation had slightly increased its proportion from 20 per cent of the total product in 1901 to 22 per cent in 1911. But at the same time it will be noted that, as the very large part of the Steel Corporation's increase in wire products was made in foreign trade—the proofs (volume 10, p. 3902) show that only 42 per cent of the Steel Corporation's wire product of 1911 was sold in the United States—it was in 1911 making relatively much less of the wire products consumed in the United States than it was in 1901.

In the important item of structural steel, used in bridges, steel-framed buildings, steel car frames, etc., the Steel Corporation's competitors produced about 67 per cent and the Steel Corporation 33 per cent. And for the same reason as shown above, in the growth of the foreign trade, it will be seen by an analysis of defendant's exhibit (volume 3, page

317, and volume 2, page 204) that in structural shapes, as in wire products, the Steel Company was in 1911 making relatively less structural articles of this country's consumption than it was in 1901.

So, also, in steel rails. In 1901 the competitors of the Steel Company made 1,100,000 tons of steel rails, and the Steel Company 1,700,000. In 1911 its competitors made 1,200,000 tons, an increase of 100,000 tons, while the Steel Company made 1,600,000 tons, a decrease of 100,000 tons.

[67] Summarizing our study of the proofs of this general subject, of the relative part of the Steel Company and its competitors in the total iron and steel production of the country, and their relative part in the home market, we find that, taking the ten years from 1901, when the Steel Company was formed, until 1911, when the Attorney General filed this bill to dissolve it, its competitors, starting in 1901, with making 49.9 per cent of the Nation's production of finished rolled product, including structural materials, rails, sheets, rods, and bars, had by 1911 so increased their relative proportion that they were then producing 54.3 per cent of the Nation's iron and steel output. And confining ourselves for the present to the production of 1911, used in the trade of the United States, which alone we are now considering, we find that of the total amount of such iron and steel products in the whole market in that year nearly 60 per cent was produced by the competitors of the Steel Company. These conclusions, based as they are on proven, practical business facts and figures, show a strong trend away from any monopolistic absorption or trade-restraining control of iron and steel manufacture or markets of the United States by the Steel Corporation. On the contrary, these figures show a strong trend in that manufacture and market toward an even greater absorption thereof by the virile and growing competitors of the Steel Company. And this leads us, in an adequate discussion of the case, to at this point take up the character of the competition in the steel and iron business in this country; for we may rest assured of the practical fact that where in any business there exists a healthy, normal, unrestrained, and virile competition, which

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all are free to enter, the individual has full freedom of business opportunity and the public is in no danger of prejudice from monopoly or trade restraint.

When the steel business of the United States is referred to, one thinks of it as practically being in the hands of the United States Steel Corporation. Circumstances have made this natural. The manufacture of iron and steel in their basic form is confined to local districts. Outside of these localities and outside of those engaged in the steel business, there was, prior to 1901, but little general knowledge or appreciation of its magnitude and its basic relation to the general business of the country. When, therefore, this great steel company was quickly formed in that year and became at once the largest corporate capitalization known, it naturally and at once became associated in the general mind with absolute monopolistic control. But the fact that the Steel Corporation, after due selection by it of such lines of finishing mills as were deemed necessary to carry out its plans, left outside of it a most strenuous body of strong competitors was not then generally recognized. The names, location, and resources of those competitors were not then, and, indeed, are not now, known to those outside the steel and iron business. Nor was the significance of the antimonopoly competitive powers and policies of such competitors appreciated. Indeed, the business fact above found, namely, that in 1911, when this bill was filed, the competitors of the Steel Company were making and marketing nearly 60 per cent of the steel and iron produced in the United States, would surprise many. Since, therefore, [68] the gist of monopoly is the suppression of competition, we deem it pertinent to ascertain from the proofs the character and steady increase of competition in the iron and steel business since the Steel Corporation was formed. In doing this, we here note of its great competitors such only as have, in the ten years of competition between them and the Steel Corporation, made a higher proportionate gain of business than the Steel Corporation itself.

Taking the Steel Corporation as the basis of comparison, we may say that while the proofs show a very material increase of 40-odd per cent in the Steel Corporation's business

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from 1901 to 1911, yet this very substantial increased percentage of the Steel Corporation's own business was less than that made by each of eight of its great competitors, as follows:

Company.	Location.	Increase of production from—	Percentage of increase.
Bethlehem Steel Co.	South Bethlehem, Pa.	1901 to 1913	3,779.7
Inland Steel Co.	Indiana Harbor, Ind.	1901 to 1913	1,495.9
La Belle	Wheeling, W. Va.	1901 to 1913	463.4
Jones & Laughlin	Pittsburgh, Pa.	1901 to 1912	206.7
Cambria Steel	Johnstown, Pa.	1901 to 1913	155.5
Colorado Co.	Pueblo, Colo.	1901 to 1912	152.8
Republic Iron & Steel Co.	Youngstown, Ohio	1901 to 1912	90.8
Lackawanna Steel Co.	Buffalo, N. Y.	1901 to 1911	63.2

Taking up these companies one by one, it will be seen that in location, facilities, capital, and basic supplies they show such strong past, present, and prospective competition as affords just ground for concluding that the steel and iron business of this country is not being, and indeed cannot be, monopolized by the Steel Corporation. For the real test of monopoly is not the size of that which is acquired, but the trade power of that which is not acquired.

Turning, first, to the Atlantic seaboard, we find there is a competitive group composed of the Bethlehem Steel Company, the Pennsylvania Steel Company and its subsidiary, the Maryland Steel Company. The two latter companies are additional to the above list, and are here referred to only to note their tidewater location as an advantage which the Steel Corporation with its inwardly located works does not possess. The works of the Pennsylvania Steel Company are near Harrisburg, Pa., and those of the Maryland Steel Company at Sparrows Point near Baltimore. These two companies have a combined capital and surplus of some $66,000,000 and with large extensions (volume 20, p. 7978) in view. Their ore supplies are drawn from the great Cornwall ore beds of eastern Pennsylvania, and from Cuba, where they have inexhaustible supplies of Bessemer ore, which can be worked by steam shovels and are close to tidewater. Three matters have impressed us in reference to this seaboard competition: First, that the eastern seaboard iron and steel com-

petition of the Steel Corporation has an ore supply wholly independent of Lake Superior; second, that their location near the seaboard gives in many cases substantial freight advantage over the Steel Corporation; and, thirdly, that the greatest advance in ore and steel production in the past ten years has been made by a seaboard competitor of the Steel Corporation, the Bethlehem [69] Steel Company. And as bearing on the question of the alleged object of those who originally formed the Steel Corporation to monopolize and unduly restrain competition and obstruct trade, it is to be noted that the striking growth and development of the Bethlehem Company was undertaken by one who helped form the Steel Corporation, who served as its first president, and who, if the object for which the Steel Corporation was formed was to monopolize the iron and steel business or to restrain trade, was warned of that intent. That such a man should attempt to build up a competitive business and succeed in expanding it as has been done shows that he at least was convinced that the field of fair, free, and full competition was open to him and others who desired to enter the steel business, and that the Steel Corporation had neither the business purpose nor the business power to monopolize the steel business or to throttle the growth of competition.

As we shall see later, the market reach of basic iron and steel plants is measurably restricted to its own district by freight limitations. Stevenson, volume 3, p. 1084; Gary, volume 12, p. 4834; King, volume 6, p. 2076; Thompson, volume 22, p. 9141. The supplies from which steel is made and the basic articles into which it is turned are of such bulk and weight as to thus localize or restrict their markets. Freight forbids such heavy product being hauled to far-removed markets. The existence and maintenance of strong competitive steel production on the seaboard is therefore a matter of grave import to the great section of the United States immediately tributary to the Atlantic coast. Into this seaboard region the Steel Corporation enters under freight burden, its bulk mills being substantially in the Chicago and Pittsburgh districts. The proofs show that its seaboard competitors named have, as noted, abundant ore sup-

plies, cheap water freights, and a great accessible surrounding market. Without entering into detail, we refer to some suggestive facts in the proofs. For example, the proofs (volume 10, p. 4028) show that the Maryland Steel Company, through its coast-line water freight of $2.50 per ton, so covers the territory supplied by Mobile, Galveston, and other Gulf of Mexico distributing points as to exclude from that territory even the product of the Tennessee Coal & Iron Company, now owned by the Steel Corporation, which pays a railroad freight of $3.40 per ton. The proofs (volume 18, p. 7248) further show that, with the enlargement of the Erie Canal system, Lake Superior ore will be canal freighted from Buffalo to New York Harbor at 28 cents a ton less than the same ore is rail freighted from Lake Erie ports to the Pittsburgh district. With the enlargement of that canal, the proofs are (volume 18, p. 7283) that blast furnaces are now planned for location on seaboard waters in New York Harbor limits. And it should be here noted that the proof is (volume 11, p. 4182) that the whole steel industry of the United States could be duplicated on the Atlantic seaboard and inland (volume 11, p. 4178) as far as Pittsburgh, and could be run on ores brought from Chili and Brazil alone. Lake Superior ores of the same metallic unit grade as the Brazilian would, in the view of the Michigan Tax Commission (Government Exhibits, volume 10, p. 2435), cost $7 a ton delivered at the Atlantic seaboard, as against ore of $3 from Brazil, which the report [70] states has "a tremendous field of high-grade Bessemer iron ores running 65 to 68 per cent metallic iron." As to the Cuban ore, the proof (volume 17, p. 6862) is:

"The total cost will not in any case exceed $2.25 per ton, and in ordinary shipping seasons will probably not exceed $2.10 per ton. This means that the ore reaches Philadelphia at a net cost of 4 cents per unit of iron. It is the cheapest ore supply in the world delivered at eastern Atlantic ports or in German or English ports. * * * In normal years, Lake Superior ores at the extreme eastern point at which they could possibly be shipped to meet eastern or foreign ores would have to get a price of 9 cents a unit in order to compete."

These facts and figures show that there is no basis on which to attempt ore monopoly. The proofs further show

that, to adequately enter this seaboard territory and meet the competition of those located on the seaboard, the Steel Corporation was forced to establish large local distributing warehouses on the seaboard. For example (volume 10, p. 4060), the Corporation has established, amongst several others, warehouses on the Atlantic Coast near New York carrying $2,000,000, and one at San Francisco carrying $4,000,000 of diversified steel products.

Proof of the strength and growth of this seaboard competition is found in the record of the Bethlehem Steel Company. That company in 1901, its first year of competition with the Steel Corporation, made 18,000 tons of finished steel product, which was largely confined to rails. By 1913, it had increased its product to 700,000 tons. During that time it had also (King, vol. 6, p. 2120) entered into competition in structural steel, armor plate, and varied steel products. Indeed, its chief products, structural steel (volume 11, p. 4149), and open-hearth rails (volume 11, p. 4150), of which it is making 200,000 tons, have been developed since 1908. From 4,000 employees it has grown to 15,000; it has in view (volume 11, p. 4336), further integration to the extent of making all the finished products made by the Steel Corporation. Its ore supply of a million and a half tons a year comes from Sweden, from the Adirondack regions in New York, from Chili, and from Cuba, where it has practically inexhaustible reserves. The proofs as to these Chilean ore fields show that this corporation and other tidewater steel plants are wholly independent of Lake Superior reserves. The Chilean beds outcrop; they are stripped instead of mined; they are within a short distance of the coast to which they are gravity dropped. They are magnetic, hematite, and dry—a great saving in transportation, as will be appreciated by those familiar with the wetness of Lake Superior ores which necessitate the carrying of thousands of tons of water. The proofs show the substantial character of this competitor with a surplus and capital of $55,000,000 and further integration in view.

Referring at this point to the existence of a fair and open competitive field, as sensed by practical men in the iron and

steel industry, we gain light from the proofs in reference to the Youngstown Sheet & Tube Company of Youngstown, Ohio. That company does not appear in the foregoing list because it came into existence after the Steel Corporation was formed. It is an inland company. Its ore supply is from Lake Superior. It started the year after the Steel [71] Corporation was formed. It purchased its reserve ore supply in 1903. It began with an investment of $600,000, which in the succeeding years has been increased to over $29,000,000. By 1913, it had an annual capacity of 1,000,000 tons of ingots and sold that year over 800,000 tons. This company is cited as evidencing three things: First, that the men in the steel and iron trade immediately after the Steel Corporation was formed felt they had an opportunity to enter and prosper in the steel and iron business, both in the home and (Manning, volume 19, p. 7968) foreign markets; second, they felt secure about their basic ore supply; and, third, they were free to and did build up a great business in making steel ingots, one of the primary products or bases.

Coming next to the Pittsburgh district, we find a strong competitor of the Steel Corporation in the Jones & Laughlin Company, which, at the time of the Steel Company's formation, the proofs show (Government Exhibit, volume 4, p. 1513) was then so integrated as to make "a greater variety of product than any other steel or iron company in the country." In 1901, its finished product alone was nearly one-half million tons. By 1912, it had increased that production to one and a half million tons. During that time it had integrated still further by building large additional works and had (King, volume 6, p. 2120) entered into competition with the Steel Company and others in the manufacture of tin plate and wire rods. Like all these other competitors mentioned, the Jones & Laughlin Company is thoroughly "integrated"; that is, it has its own basic supplies and carries on its work in continuous process from ore to diversified finished steel products. It has large reserve holdings of ore in the Lake Superior region and an ore fleet on the Great Lakes with a carrying capacity of 40,000 tons. It has over $50,000,000 capital and a large surplus.

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Going east, we find at Johnstown, Pa., the Cambria Steel Company, a strong company also thoroughly integrated, and with an investment of nearly $70,000,000. From 400,000 tons finished product in 1901, the Cambria increased to nearly 1,200,000 tons in 1913, and it has (volume 6, p. 2199) further improvements in view looking to a large increase in its output. It has a 50-year's supply of Lake Superior ore and a Lake fleet of a capacity of 50,000 tons. At this point, the president of this company might be quoted. He was called as a witness both by the Government and the Steel Company. His testimony is enlightening, as showing that his and other companies in the steel business feel the Steel Corporation has no power, even if so disposed, to monopolize, restrict, or stop their business. We quote (volume 28, p. 12034) from his testimony:

"Q. Have or not the leading competitors of the Steel Corporation, since 1901, increased their capacity or further integrated or added to their holdings of ore or coke?—A. Oh, yes, sir; there have been a great many new properties secured by the other companies, and a large number of developments in both the coking regions and the ore regions.

"Q. And what would you say as to their progress, if they have made any, in the matter of integration and diversification of products?—[72] A. I think all of the companies have expanded and improved their plants and strengthened their holdings of raw material.

"Q. In your testimony for the Government, referring to Jones & Laughlin, the Lackawanna, Cambria, the Republic, and perhaps others, you stated as follows: 'I do not think that there is any one of those companies that could not compete with the United States Steel Corporation, and compete successfully.' You were not then asked to give your reasons for that opinion; be good enough to give them now.—A. It is a very simple proposition to build a furnace and steel plant or finishing mills fully the equal of the Steel Corporation's and labor can be employed at exactly the same price, and there is absolutely no difficulty in producing the various products at practically the same cost.

"Q. Has the Steel Corporation any such advantage owing either to its size, the extent of its integration, or any other circumstance as would enable it to put its competitors out of business did it choose to do so?—A. No, sir. It would be impossible for it to do so without committing suicide.

"Q. Why?—A. Well, their product is practically sold in this country. Of course, they do a small export business, but they sell to the

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same people that we do, and we sell to the same people that they do, and if they would make prices so low that we could make no profit on it there would be nothing left for the Steel Corporation; and if they would undertake to put us out of business by selling below our cost, they would be selling below their cost, so that I cannot see how it would be possible for them to put a well-managed concern out of business.

"Q. Could the Steel Corporation confine any destructive warfare which it might undertake to any one competitor? In other words, could they wage a warfare against the Cambria or Jones & Laughlin or any of the other considerable concerns without involving the rest of their competitors?—A. No, sir; that would be impossible.

"Q. Could they confine any warfare that they might undertake either against a single competitor or against all other competitors to any particular locality?—A. No, sir; because the markets are all affected in sympathy, and if the price was made below cost in one market only, we would go to the other; we would seek other markets.

"Q. Why do you say that the Steel Corporation could not make war against one competitor only without involving the rest of them?—A. Because, for instance, we all sell to practically the same class of trade, to the same customers. We sell to many people who buy from Jones & Laughlin and the Steel Corporation and the Republic and the Inland Steel Company, and various other companies, so that it would be impossible to pick out the customers of any one manufacturer, and you cannot affect the price in one market without affecting it in all the other markets in the country.

"Q. Has the ability of the Steel Corporation to resist any such warfare increased since 1901? Are they any better able to take care of themselves in such a warfare now than they were in 1901?—A. No, sir; I would say that they are not. I do not fear the Steel Corporation as much as I fear other competition."

Without going into detail as to other companies in the foregoing list, we may refer to the Colorado Company, whose market, the proofs show (volume 26, p. 10935), covers the United States west of the Mississippi. This company is integrated, is independent of the Lake Superior ore, has more than 60 years' supply of its own ores in Wyoming, New Mexico, and Utah, and has largely expanded its plant since 1901. It has resources of $80,000,000, and its finished product has increased from 200,000 tons in 1901 to about 500,000 tons in 1912. This company has by its western location (volume 26, p. 10937) a freight advantage over the United States Steel Corporation and all other eastern [78] competitors in selling rails to most of the railroads west of the Mississippi.

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The history of the next company is illustrative of the feeling of confidence and security among practical steel men, which warranted them in making since the Steel Corporation was formed large expenditures and entering into competition in the steel business. The Republic Iron & Steel Company, of Youngstown, Ohio, was in 1901 engaged principally in making iron. Its finished product that year was some 500,000 tons. It has since expended $25,000,000 in changing its business from iron to an exclusively steel one. Like all other steel makers, the Republic Company's policy has been one of simply following the progressive and universal practice of integration incident to the development of the use of steel. The Republic Company's process of integration its president (volume 2, p. 731) well describes:

"We have practically eliminated all our scattered iron mills, have concentrated them in the operation at a few points of production. So, to-day we produce practically but little iron and are manufacturing about 1,000,000 tons of steel per annum. This is what we call an integrating process; that was part of it, the addition of the mineral and coke and blast furnaces, and balancing up operations generally, completing the integrating process. * * * This integrating process that I speak of attended our development of the steel end of our business. We did not need it so much when we were simply manufacturing iron. It was done for economic and trade reasons, on account of the increased demand for steel and the decreased demand for iron."

The Republic has increased the range of its product and production until it is now a million and a quarter tons and extends (volume 28, p. 11999) all over the United States and Canada. It has gone into the Birmingham, Ala., field, where it has plants, as well as in Pennsylvania, Missouri, Illinois, Indiana, Iowa, and Michigan. It has acquired 40,000,000 tons of Lake Superior ore reserve and 80,000,000 in the Birmingham district, and has a lake fleet of 18,000 tons. Its growth during this time was such (Topping, volume 2, p. 735) that it is producing one twenty-fifth of all the steel produced in the United States and one-thirtieth of all the iron. From a study of the testimony there is no doubt that the men who made these large expenditures in 1906 were satisfied that the field of fair business competition in the iron and steel business was open to them. These expenditures were made in completely integrating its manufacturing fa-

cilities. This integration consisted (volume 22, p. 9131) in increasing its blast and open-hearth furnaces and ore supply and carrying their basic product forward to completion by additional plants which included finishing mills for merchant bar, for sheet bar, for billets, and for plate in addition to galvanizing works, rivet, spike, bolt, and nut departments, and by-product coke works. They have no more to fear from the competition of the Steel Corporation than they have from that of any other of their other competitors. The testimony of this company's president, who like the Cambria's president, was called as a witness both by the Government and the Steel Company, is instructive on that point. It is:

"Q. Where is the market for your product?—A. All over the United States and Canada."

"Q. Has the Steel Corporation, in your opinion, power to put the Republic out of business?—[74] A. I think not.

"Q. Has it the power to put its competitors generally, or any of its principal competitors, out of business?—A. I would say not.

"Q. What is your reason for thinking that they have not that power?—A. I would have two reasons: One, that they have not the physical ability to do it; and, secondly, if they attempted it, they would involve their own market to such an extent that they would suffer equally with us. What I mean by physical is this: Their principal competition, companies like ourselves and others as strong as we are, are properly integrated; in other words, being self-contained on raw material, well equipped, and at least fairly well managed and properly financed, so that a combination of that kind would give us as much power to produce within somewhere a close approximation of their cost: at least their difference would not be so great that they could put us out of business. They have some advantages, and so have we.

"Q. Now, as to your second reason, that it would involve them in loss as well as you, what do you mean by that?—A. Well, to illustrate, we might have a customer, we will say, in Michigan, engaged in the manufacture of agricultural implements, and another one in Illinois or Indiana. If we should sell in Michigan steel bars and plates that enter into the cost of production of a machine at a less price to A. in Michigan than we do to B. in Illinois, we would probably soon hear from B. in Illinois, because those two men would naturally compete in the general market of the United States with their machinery. So it would be with all other fabricated products made from steel. The markets are interrelated and interlaced to such an extent that you cannot reduce prices, in my judgment, in one market without affecting in a short time the market elsewhere for the same commodity.

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"Q. Could the Steel Corporation localize a destructive warfare against its competitors?—A. Not in my opinion.

"Q. Why not, if there is any other reason than you have already indicated?—A. I should say that the reason I have already indicated would be a complete answer to that thought. There is a sympathetic relationship existing between all markets that is so close that my experience would compel me to say that you could not affect the price in Chicago without affecting the price in New York. As a matter of fact, that is the experience that we have had.

"Q. And could the Steel Corporation wage a destructive warfare against any one of its competitors without involving all of them?—A. No; I would say not."

The same confidence to enter into competition thus evidenced in the Republic Company was also shown in the Inland Steel Company of Indiana. That company had expanded its investment from some $4,000,000 to $20,000,000. It has acquired Lake Superior ores and a lake fleet of considerable capacity. Asked the question (volume 22, p. 9144):

"From your knowledge of the iron and steel business, the relative capacities of those engaged in it, the capitalization of the United States Steel Corporation, its ownership of railroads, its connection with financial interests, state whether or not in your judgment it has the potentiality, if it uses it, to destroy its competitors?"

—Its president testified:

"A. No; that is absurd. They cannot do it. I think it is a physical impossibility. I cannot imagine how they could do it.

"Q. Is there any possible doubt in your mind of the ability of the Inland Steel Company to maintain itself in any kind of competition?—A. Well, that is what we are aiming to do. We think so. We think we are getting as well prepared as most of our competitors by the money that we have [75] spent there; and I believe it has been spent on the right lines. I know that we would not change any of it if we had it to do over again, as far as we have gone.

"Q. And you are very well integrated, as you have stated?—A. Yes; we did the best that it was possible to do.

"Q. Mr. Thompson, you stated, in answer to my question a short time ago, that the competition between the Inland Steel Company and these other companies had been active in the territory that you serve?—A. Yes, sir.

"Q. What do you mean by 'active'?—A. Always at it. We were always trying to get business. I don't know how to express it any stronger than to say that we were all looking for trade in an active way, all the time, keeping ourselves posted on conditions and soliciting business from just such men as the witness who was examined here this morning and from other railroads; I say it is active because we are always at it—all of us."

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We have referred above to competitive steel conditions on the Atlantic seaboard as shown by the proofs. Those proofs also show (Pigott, vol. 26, p. 11066) how competition to the Cambria, Jones & Laughlin, and the Steel Corporation has grown on the Pacific coast. This competition has increased since the Steel Corporation was formed. Mr. Pigott testifies his company has built at San Francisco open-hearth furnaces with a capacity of 30,000 tons; bar mills, with 30,000 tons' capacity; and at Seattle a rail re-rolling mill with a capacity of 30,000 tons. For its basic supply this company is wholly independent of the Steel Company, Jones & Laughlin, the Cambria Steel, and all eastern companies doing business on the Pacific Coast. This is clearly shown by the proofs. This company gets one-half of its pig iron from China and the balance from the Republic Company and the Tennessee Coal & Iron Company. The proof is (volume 10, p. 3887) that the freight paid to deliver the Tennessee Company pig iron from Birmingham, Ala., to San Francisco is $10.08 per ton. The proofs further show (page 3889) that the Chinese pig iron is delivered at Pacific points at a freight rate of $3.70 per ton. If to this $3.70 be added the price of the pig iron, $6.20 per ton, it will be seen that the Chinese pig iron at $6.20, plus freight $3.70, $9.90, can be paid for and delivered on the Pacific coast for about the amount, $10.08, the Republic and the Tennessee Company pay for freight alone. As the proofs (page 3887) further show the pig iron from India is being delivered in San Francisco from Calcutta at an expense of $12.38 per ton, namely, price of pig iron $5.40 plus freight $6.98, it will be seen that the future basic supply of this and other companies that may spring up on the Pacific coast can be had of Asiatic pig metal wholly independent of the Steel Corporation and other eastern competitors. In view of the further proof (volume 11, p. 4182), that the ores on the western coast of Mexico, and necessarily those of Chili, are also available, and that the improved practice in steel making (volume 3, p. 992) makes ores now usable which were formerly not so, the conclusion is warranted that the field for all possible development on the Pacific coast in the steel business is wholly free from

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any monopolistic control whatever. It will thus be seen that a substantial steel industry in rails, bars, and open-hearth steel has in fact grown up on the Pacific Coast, while in competition with the Steel Company, a competition which Mr. Pigott (volume [76] 11, p. 11074) describes, "from the standpoint both of a customer and a competitor," "has been beneficial."

As we have said, we have, as throwing light on the substantial character of the strong and increasing competitive forces in the steel business, referred only to those above named. It is proper, however, to add that the proofs in the case (Defendant's Exhibits, volume 1, p. 137; volume 2, pp. 209, 210; and volume 3, p. 374) show the Steel Company has eight competitors in rolling structural shapes—that is, beams, etc., for bridges, skyscrapers, etc.—and in the fabrication of such structural material over 300 competitors. In the rolling of merchant bars it has very considerably over a hundred competitive mills.

Later we shall note the testimony of competitors as to their relation to the Steel Corporation, but before referring to individual relations, we deem it proper to here refer to some general phases of monopoly which affect all competitors. One of these was the practice by large companies of exacting freight rebates from railroads under threat of diverting shipments elsewhere. These practices were common up to the time of the ending of the old era of freights unregulated by the Government (Government Exhibit, volume 3, p. 1120; volume 2, p. 441; volume 3, p. 1031; volume 3, p. 1035, and the discussion in volume 3, pp. 956, 957). In *Swift & Co. v. United States*, 196 U. S. 402, 25 Sup. Ct. 276, 49 L. Ed. 518, the Supreme Court said:

> "It is obvious that no more powerful instrument of monopoly could be used than an advantage in the cost of transportation."

And in the Standard Oil case, *supra*, this subject was again referred to as—

> "the acquisition here and there which ensued of every efficient means by which competition could have been asserted, the slow, but resistless, methods which followed, by which means of transportation were absorbed and brought under control * * * all lead the mind up

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to a conviction of a purpose and intent which, we think, is so certain as practically to cause the subject not to be within the domain of reasonable contention."

On January 28, 1905, Congress directed (Government Exhibit No. 206, volume 5, p. 1615) the Secretary of Commerce and Labor to investigate the steel and iron industry of the country with a view to ascertaining to what extent the United States Steel Corporation controlled the output and prices of finished product made by independent companies dependent upon it for their raw material and to report any restraints by it of commerce, foreign or domestic. James R. Garfield, who as Secretary of Commerce and Labor, made this examination, was called as a witness. He testifies (volume 14, p. 6190) he had made an investigation and examination of the railways in a similar manner to that made in the Standard Oil, and found no rebating whatever by the railroads to the Steel Corporation. That he was justified in his conclusion is strengthened by the fact that at a meeting of the Steel Corporation's executive committee in 1901, called to consider the policy of the company toward railroads, the minutes (Government Exhibit, volume 3, p. 957) show the position taken the first year of the corporation's formation by its chairman and there recorded, was "that we cannot afford to [77] take the position of asking any railroad, directly or indirectly, to discriminate in our favor." This policy was later emphasized (volume 12, p. 4790) in a letter sent to the presidents of the railroads (Defendant's Exhibit, volume 3, p. 295), handling the Steel Corporation's freight, as follows:

"[Personal.] SEPT. 20, 1905.

"DEAR SIR: As you know, this corporation long since adopted the uunalterable policy of recommending to subsidiary companies in which it is interested, that under no circumstances should rebates be solicited or received contrary to law. This policy will be strictly adhered to and it is hoped and expected your subordinates will be advised and instructed accordingly. If any one should at any time violate his instructions in this respect, notice of the same should be promptly given to the president of the subsidiary company interested and also to the undersigned.

"Yours, very truly, W. E. COREY, *President.*"

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In view of this announced policy of the Corporation, of the investigation made by the Department of Commerce and Labor, of the absence of any complaints by any competitor, and of no proof of any freight rebate being given, we are justified in concluding that the Steel Corporation has not used, or sought to use, freight rebates as a means of undermining its competitors, or of monopolizing business.

We next turn to ruinous trade wars against competitors which, as we have seen, was one of the features of attempted monopoly denounced by the Supreme Court. In that connection it is to be noted that under conditions incident to the steel trade the power of a large steel company to carry on a ruinous trade war against any particular competitor does not exist in the iron and steel industry. The customers of the great steel companies are large jobbers and the purchasing agents of other companies, who are in the closest touch with every fluctuation of the steel market. The result is that any effort on the part of any one of these great steel companies to inaugurate a trade war by ruinously underselling a competitor would at once, owing to the sensitiveness and interrelated character of the steel market, result in forcing the company that was thus ruinously selling in any particular market or locality to in the same way ruinously lower its prices in every other community. In that respect, the president of the Youngstown Sheet & Tube Company, a competitor, testified (volume 22, p. 9144) that, if the steel corporation attempted such a course, "they would involve their own market to such an extent that they would suffer equally with us." The testimony of the president of the Cambria Steel Company, already quoted (volume 28, p. 12036), is to the same effect, as well as that of the president of the Republic Iron & Steel Company (volume 28, p. 11999). And the practical impossibility of such a course is shown by Judge Gary (volume 14, p. 5378), where he testifies:

"I feel certain that by reason of our integrated proposition we had the advantage in cost of production over our competitors generally. If any one having advantage in any business is willing to sell down to his cost price, of course he would live while his competitors would starve; but that is a most unnatural position for any producer to take and long continue."

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[78] In view, therefore, of the uncontradicted proof of those familiar with the steel business that no such ruinous trade war could with profit to itself be carried on by the Steel Company against a competitor, and in the absence of proof of any effort by it to harass them by such conduct, we are warranted in concluding there has been no attempt by the Steel Corporation to monopolize or restrain trade through ruinous trade wars against its competitors. For of the conduct of the Steel Corporation, the views of its competitors is the best gauge. Monopoly and unreasonable restraint of trade are, after all, not questions of law, but questions of hard-headed business rivalry, and whether there is monopoly of an industry, whether trade is subjected to unreasonable restraint, whether there is unfair competition, are facts about which business competitors best know and are best qualified to speak. And it may be accepted as a fact that where no competitor complains, and much more so where they unite in testifying (Campbell, volume 5, p. 1857; Smith, volume 19, p. 7942; King, volume 6, p. 2121; Bowron, volume 25, p. 10247; Pigott, volume 26, p. 11075; Manning, volume 19, p. 7701) that the business conduct of the Steel Corporation has been fair, we can rest assured there has been neither monopoly nor restraint. Indeed, the significant fact should be noted that no such testimony of acts of oppression is found in this record as was given by the competitors of the Tobacco or Standard Companies in the suits against those companies. We have carefully examined all the evidence given by competitors of the Steel Corporation. We have read the testimony of customers who purchased both from it and from its competitors. Its length precludes its recital here, but we may say its volume, the wide range of location from which such witnesses came, and their evidently substantial character in their several communities make an inevitable conclusion that the field of business enterprise in the steel business is as open to, and is being as fully filled by, the competitors of the Steel Corporation as it is by that company.

Taking as fair samples of the views of the competitors, we note, first, the testimony of James Bowron, president of the

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Gulf States Steel Company, who says: "Their competition is strictly fair." Herbert S. Smith, vice president of the Standard Steel Company of Alabama and formerly general sales agent of the Lackawanna Steel Company of Buffalo, who says: "I have always regarded the competition of the Steel Company's subsidiaries as the fairest competition that we have." Of western manufacturers, we note that of William Pigou, president of the Pacific Coast Steel Company, who says:

"I have always found the competition of the United States Steel Company and its subsidiaries fair; its existence has been beneficial to the steel and iron trade of the country."

We have noted above the remarkable growth of the Youngstown Sheet & Tube Company, which came into existence in 1905, and in the meantime has grown to be a very important competitor of the Steel Company. The testimony of James A. Campbell, its present president, who was called as a witness by the Government (volume [79] 5, p. 1857), so fully covers the subject of the attitude of the corporation toward its competitors and the purchasing public that we quote it at length:

"A. My experience is that it is the best competition we have; that they are open and above board in all of their dealings. Their prices are either published, or we get direct information from them or through our customers as to what their price is, and we find that their price is practically the same to everybody. With other competition that we have, with the independents, for instance, the independents vary more in their prices, and we never quite know what their price is. It may be one thing to-day and another to-morrow, and they do not conduct their business in the same way, because it is a smaller business and more of an individual business; and they will make prices according to the class of material pretty largely and the class of orders. So we were not as capable of gauging how they are conducting their business as we are in regard to the subsidiary companies of the Steel Corporation.

"Q. Is your competition with these subsidiary companies of the United States Steel Corporation active and energetic and vigorous competition?—A. It is—very, at times. We sell to many of the same people that they do, the same class of material.

"Q. Have you ever known of their having made low prices in a limited section of the country for the sake of attempting to put a competitor out of business?—A. I think not. I do not recall any time, with any company.

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"Q. Have they, in your experience, been guilty of any unfair methods to suppress competition?—A. I think in the early days—I did think in the first two or three years we were in business that there were some things done, and I think done without the knowledge of the higher officials, that were unfair; but those disappeared promptly, and there has been nothing of that kind, nothing but the fairest competition in every respect for the last seven or eight years.

"Q. When the market has been falling, what has been your experience as to the prices which they have maintained as compared with those of the independents?—A. In depressed times, when there is not nearly enough business to keep all of the mills operating to their full capacity, their prices are usually higher than the independents. In good times, when the mills are all working to capacity, their prices are usually lower than the independents. The independents will accept bonuses and do things of that kind that I do not think the corporation will do. So that I think the general effect is for the steadying of prices and making them better for the country at large, and of course, in dull times it is a greater protection to the smaller manufacturers to have them keep their prices up, when business is slack, than it would be if they went out like the Carnegie Steel Company did in the early days and took all the business and shut the other people down."

To this may be added the testimony of Charles M. Schwab, who knew the conduct of the company as one of its original officers, and later as one of its competitors, felt the effects of its policy. We quote from his testimony (volume 11, pp. 4154, 4155) at length:

"A. In the beginning of the Steel Corporation, during my presidency, the policy of the corporation towards its competitors was not one of endeavoring to hurt; not one of endeavoring to stifle, or to destroy, but the policy of naming a price for our products, not only to our customers, but openly through the trade journals, if you will, because I used to give it to the Iron Age and the Iron Trade Review each week, and the sticking to these prices throughout the trade; there probably were exceptions of a minor character to very large consumers, but as a rule, during my presidency of the corporation, the prices of its products were fixed and published, and they were what were charged the customers. Is that clear?

"Q. You say you gave these prices to the public, as a rule, once a week?—A. I did.

[80] "Q. To the trade journals?—A. To the Iron Trade Review and the Iron Age.

"Q. Are they the principal trade journals in the steel industry?—A. They are the principal trade journals.

"Q. What has been the practice of the corporation in those respects or along those lines since you left the presidency, as you have observed

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it, from the point of view of a competitor?—A. So far as I know, from the point of view of a competitor, they have adopted since that time practically the same policy.

"Q. Have you ever known of the Steel Corporation to have a published price and a secret price differing from the public one?—A. So far as I am concerned personally, I do not know of any.

"Q. Have you ever known or heard of a case where the corporation has sold at a less price in a particular market to drive out a competitor?—A. Never.

"Q. Or has sought to obtain a customer of a competitor by secret rebates or departures from these open published prices?—A. I have never heard of such a thing.

"Q. Either while you were president or since you have been a competitor?—A. Never."

We next turn to that most injurious feature of monopoly's wrong to the public, to wit, increase in the price of its product or a deterioration in quality. Turning, first, to the basic question of quality, no dispute arises under the proofs. They are simply uniform that both with independents and the Steel Corporation, there has been a steady bettering of quality in steel products. This factor of improving its product has been recognized by the Steel Corporation, and a study of the testimony of its buyers satisfies us that this progressive growth in quality by the Steel Corporation has been the principal means by which it has acquired and held its business.

Turning next to the increase in price, we are met by two aspects of the case. Two learned experts have been called, one by the Government and one by the Steel Corporation, who draw different conclusions as to whether there was an increase or decrease in the price of iron and steel products. The deductions of both are supported by weighty contentions and numerous enlightening charts. The able reasoning of both has had the thoughtful consideration the standing of the two men challenges. We may note that the different ranges of time they have taken as the basis of their reasoning really makes them reason about two different things, but apart from that, we think, whatever may have been the range of iron and steel prices during the periods of consideration selected by each, the proof is (volume 28, p. 12000) that in these days of quick communication the gen-

eral price of steel and iron products cannot be localized, but is interdependent, in this country, and, indeed (volume 28, p. 12013), internationally so. That proof is that when there is an oversupply, even in the European steel and iron market, that market tends to unload on the American steel market; and, on the other hand, when there is an oversupply here, this country seeks to dump on their markets at any price. Without citing the proof in that regard, we may refer to Corrigan, volume 26, pp. 11096, 11102; Moller, volume 19, p. 7666; Topping, volume 28, p. 12013; Kahn, volume 23, p. 9483. It will also be observed that so sentitive and interrelated is the price of steel and iron that a drop in price of any particular branch of steel leads to a drop in all other branches. King, volume 6, [81] p. 2114; Schwab, volume 11, p. 4387; Kennedy, volume 5, p. 1873; Topping, volume 2, p. 682.

No evidence is produced showing that there has been at any time an arbitrary or unreasonable increase in price of any of the numerous products of the Steel Corporation. On the contrary, the proofs (Government Exhibit, vol. 14, pp. 2912–2922) show decreases in important steel products, among which we may refer to wire nails, which from selling in 1901 at $51, when the Steel Corporation was formed, were in 1911, when this petition was filed, selling at $36. During the same time, steel bars receded in price from $33 to $25. Steel beams dropped from $36 to $27; billets from $27 to $24; and a statement taken from the Steel Corporation's accounts (Defendant's Exhibit, volume 2, p. 203) shows there was between 1904—a date when the Steel Corporation may be said to have been fairly systematized and under way—and 1912 a decrease in fabricated prices received by the company of 19 per cent, and of all other products of 11 per cent. Summing up the business result, the president of the corporation (volume 10, p. 3854) testified the Steel Corporation was in 1912 getting about $8 a ton less for materials in the domestic market than they were receiving in 1904. Moreover, it should not be overlooked that during these years there were substantial factors of increased expense in the cost of manufacture. The

freight on coke (volume 10, p. 3781), of which the corporation uses some forty thousand tons a day, has increased 12 per cent since 1901; the freight on limestone, which constitutes one-third of a furnace's burden, has increased 10 per cent since 1901; and iron and steel wages (volume 10, p. 3895) have increased 28½ per cent.

Standing aside for later discussion the matter of the Gary dinners and the meetings following them, through which it is alleged the Steel Corporation in coöperation with its competitors unduly restrained and obstructed the normal course of the steel trade, and confining ourselves to the fixation or control of prices by the Steel Corporation itself, or its subsidiaries, we may say we have found in this record no proof by any witness showing any instance in which the Steel Corporation or its subsidiary companies has set either an arbitrary, exorbitant, unfair, or controlling price on any one of its numerous products. It is a mere truism to say that the fixing and maintaining by a manufacturer of a fair price above cost is not only a right but a commercial necessity, and any other course, must end in his bankruptcy. When such fair prices are departed from and they are unreasonably raised and exacted from the purchasing public, the public is prejudiced thereby. On the other hand, when that price is so unreasonably lowered as to drive others out of business, with a view of stifling competition, not only is that wronged competitor individually injured, but the public is prejudiced by the stifling of competition. Between these two price extremes, there must, in the nature of things, be a considerable zone of reasonable price variation, and what is a fair price is a question which can only be determined by a careful ascertainment from cost sheets and other data of such fair price. In the present case neither side has furnished this court with proof from which we could intelligently determine whether the prices charged by the Steel Corporation for any [82] of the numerous articles here involved, beginning, for example, with pig iron and ending with rails, was unfair, exorbitant, or unreasonable. In the absence of such testimony, it is manifest that for this court to assume that the prices at which any of these articles were sold by the Steel

Corporation and its competitors were unfair would be to base such conclusion on surmise instead of proof. But there is not only this absence of testimony in regard to the prices received being unfair and exorbitant, but there is, on the other hand, affirmative testimony, which we can not disregard, and which, as it seems to us, constrains us to conclude that the prices of the product sold by the Steel Corporation have been the result of the joint action of the law of supply and demand and of that vigorous rivalry which has at all times existed between the Steel Corporation and its competitors. In that respect we have the testimony of the Steel Corporation's great competitors, of large and small manufacturers, over the whole country who purchased basic steel products and put them through other stages in their mills and factories; of jobbers and warehousemen who buy and hold for sale large stocks of steel products. The testimony of these men—and there is no testimony to the contrary—is that the iron and steel trade in the various products of the Steel Corporation is and has been open, competitive, and uncontrolled, and that all engaged therein have free will control in selling at their own prices. This important fact we shall not leave to here stand as a statement of a conclusion reached by us from a study of the testimony in volumes 18 to 28 inclusive; but, at the risk of unduly prolonging this opinion, we shall here spread of record the testimony of a few witnesses on that subject so that he who runs may read.

In taking up that question, we have, in the first place, the proof that so far as the prices charged by the Steel Company are concerned its practice has uniformly been to give the utmost publicity to such prices. In that regard, Charles M. Schwab, a former president, testified (volume 11, p. 4154), as already noted above:

"In the beginning of the Steel Corporation, during my presidency, the policy of the corporation (was) * * * of naming a price for our product not only to our customers, but openly through the trade journals, if you will, because I used to give it to the Iron Age and the Iron Trade Review each week, and the sticking to these prices throughout the trade; there probably were exceptions of a minor character to very large consumers, but as a rule, during my presidency of the corporation, the prices of its product were fixed and published and

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they were charged to customers. * * * So far as I know, from the point of view of a competitor (the witness is now president of the Bethlehem Steel Company) they have adopted since that time practically the same policy."

That these published prices are met in vigorous competition the proofs show. President Campbell of the Youngstown Company, speaking of his company, says in substance, that their (volume 5, p. 1857) competition with the subsidiary companies of the United States Steel Corporation is active and energetic and vigorous, very at times. We sell to many of the same people that they do—the same class of material.

The sales manager of that company (volume 19, p. 7701) testified that the subsidiaries of the United States Steel Corporation have been [83] our competitors in these various lines of production and sales in every line we manufacture and throughout the country. The competition has been very severe.

The president of the Colorado Company (volume 26, p. 10940) says that, in the bar-mill products, they meet Jones & Laughlin, the plants of the Steel Corporation that make these products, the Cambria Steel Company in some of them. The competition has been vigorous and independent and unrestricted, so far as it affected them. He thinks the competition has increased in extent. There are two or three new elements in the field and that has made all the old ones a little more active, including themselves.

The testimony of the sales manager of the La Belle Iron Works, of Wheeling, W. Va., may be taken as typical of the existence of an open steel market in competition with the Steel Corporation. That company had, during the ten years following the organization of the Steel Corporation, increased its finished product of billets, sheet bars, nails, tubes, plates, skelp, and sheets largely over 400 per cent, and its market covered the entire country, Mexico, and Canada. Its sales manager (volume 19, p. 7876) said that their competitors are all the leading steel companies, pretty near, take the Lackawanna, Cambria, Republic, the Youngstown Sheet and Tube, the Wheeling Steel & Iron, and the various constituents of the Steel Corporation. The prices which they

obtain for their steel products are not fixed in agreement with their competitors. That is true of each and every year of the ten years that he had been general manager of sales. It is true of each and every article they have produced and sold in the market. There has been no time during the ten years when the price of any article they have produced and sold has been fixed by agreement with any competitor. He is able to say that because the chances are that if it had been done in his company he would have known it. That is his business. The prices have sometimes been fixed in a general way in consultation with their president. *No price has ever been suggested by the president or anybody else in any of these conferences, as a price agreed upon by any competitor.* The considerations that controlled him in these conferences, or when he acted independently of them in fixing prices, were competitive conditions and cost of manufacture. The state of their order book affects the question of prices. When the order book is lean they probably make lower prices. When full of orders the chances are they will advance prices. That is always the case. It is observable that competition is keener and competitors more active when times are dull and order books are lean. Prices usually rule higher when business is active, and when business is dull they rule lower. The prices obtained by them have fluctuated. He would say the prices obtained by their competitors have fluctuated. The trade or competition in these various articles manufactured has been nearly always active during the period he has had charge of the sales. The competition has been what you would term keen. They met three or four or more competitors in every article they manufacture. The competitors are numerous. They have grown in numbers and output.

The testimony of the chairman of the Republic Iron & Steel (volume [84] 26, p. 12019) shows how that large company arrives at its prices; they do not have uniform prices. They sell to some customers at one price and to other customers at another, varying with the size of the order, the quality and the character of the service they are expected to render naturally. They have traveling men and their own branch sales offices. As a general rule, they send out to them

prices at various times at which they are to sell their various products. They give minimum prices below which they shall not go, and allow them to use their intelligence in getting all above they can. That minimum would naturally be the same for all of them. Generally speaking, it would be the same based on cost. They give them the same latitude; in other words, the same general base, which represents a minimum below which they must not go, as it might involve a loss.

The general sales agent of the Lackawanna from 1905 to 1910 testifies (volume 19, p. 7905) as to the competitive prices of that company other than rails, to which special subject we refer later. He says: That he had entire charge of the sale of the output of that company, making prices. Their market covered practically the entire United States. Their product was always sold in competition with the product of other manufacturers of steel. The competition was always keen, and a great many times aggressive. The leading competitors were the mills of the Steel Corporation, the Carnegie Steel Company, the Jones & Laughlin Steel Company, the Inland Steel Company, the Cambria Steel Company, the Pennsylvania Steel Company, the Eastern Steel Company, the Carbon Steel Company, the Maryland Steel Company; there were some others that he does not remember for the moment. In general, and in almost every case, he had the fixing of the prices. The prices were not fixed in agreement with competitors, always independently. That holds for the whole period of five years that he managed the sales. There was no time during that period when the prices he either quoted or fixed were quoted or fixed in agreement with any of their competitors as to any article that they sold. The prices were both uniform and variant. They might have been uniform on steel rails in some cases, and they might have been uniform on steel plates and shapes in some cases, but not necessarily so. They were following (referring to the uniformity on plates) at that time what they called the market price, and as a rule they tried to obtain the so-called market price. It was a matter of pride with a steel manufacturer to sell his goods at as high a price as

that of any other manufacturer; and if the leading makers were getting $1.60, they felt it was up to them to get the same price; hence the uniformity of price. They were not always able to get the price they tried to get. They found some means of shading it. The extent of their order book or list was a great factor in making prices, the terms of payment, and delivery. If the mill was short of orders in any one line, special efforts were made to get business in that particular line, and in such cases the seller is inclined to be rather more moderate in his demands as to price, terms of payment, and all that. The prices varied considerably both ways during the period mentioned. That is true of everything except rails. When he went with the Lackawanna Steel Com[85]pany he found that the price of standard Bessemer steel rails was $28 a ton at the mill. It had been fixed for some time. He did not know how long a time. That price he adopted and never varied from it. It was tacitly understood that that was the price of their steel rails as fixed by the Lackawanna Company. He testified that no statement (referring to conferences with the president on the prices of other products) was ever made in any of these conferences by the president of a price agreed on with competitors which would be adopted or maintained by the Lackawanna. He did not recall any instance in which he was ever interfered with by an officer of the Lackawanna during the time he was there in quoting such price as seemed best in his judgment to be warranted by business conditions. He does not recall any price ever named by him based on any other consideration than competitive business conditions.

As to the Jones & Laughlin competition, the testimony of the man in charge of the sales (volume 20, p. 8029) is that Jones & Laughlin make steel billets, slabs, and blooms, and convert these into finished products, principally structural material, plates, bars, shafting, chains, spikes, wire, wire nails, tin plate, and black sheets in tin mill sizes. These different products that they have are sold in competition with other makers of similar products. The competition is unlimited. He means unlimited by agreements as to prices. That is true of everything he has mentioned. *He says that this has been so to his knowledge for about nine years.* The competi-

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tion has been keen. It extends to competition in the matter of prices.

Turning from fellow competitive makers of the same general products as the Steel Corporation, we naturally turn to the testimony of mill-owners who use as their basic supplies the products made by these large companies and inquire whether, as buyers, they have found any price fixation by these basic manufacturers. As a type of that character, we note the testimony of the president of such a company (volume 20, p. 8050), who, in substance, says:

I should say we were using about 25,000 to 30,000 tons a year in 1901. It has been growing each year. I think last year we purchased something in the neighborhood of 100,000 tons. I know of no other single customer for bar mill products in the United States that buys as much as 100,000 tons. We buy from the Carnegie Steel, the Cambria Steel, the Republic Iron & Steel, the Youngstown Sheet & Tube, and others. We have always found competition for our purchases of bars. Very keen most generally. Of course, there are times in normal business when it is not so keen, times when the consumers of bars are competing to get them. We can generally purchase at a less price than the quotation. That is, the quotations published in the Iron Age or the Iron Trade Review. *I have never observed any indication of a combination or agreement among bar makers to fix prices.* We have always been able to buy on fair competition. I think we have always been able to get the benefit of fair competition.

The general manager of the next largest company of this character in the country (volume 20, p. 7999), speaking of the purchases of his company, in substance, says:

The competition is mainly between the Carnegie and the Republic. Price is one kind of that competition; the ability to handle our particular class of business and sufficient capacity on account of our enormous consumption of bars. We generally contract for our tonnage, and we take bids on that con- [86] tract. There is competition in the matter of price; in the matter of delivery; and, to some extent, in quality. So far as we know or can find, there is no evidence of price fixing between the companies. We believe there is genuine competition for our business.

The president of a large boiler works and a purchaser of both plates and tubes (volume 20, p. 8015), in substance says:

We receive quotations on plates from Lukens Iron & Steel Company, Worth Bros.; Carnegie Steel Company, Cambria, Carbon, and, occasionally, Allegheny Steel. They vary. There is a difference in

the quotations from the different concerns. There is a range from one to three dollars a ton. We have never observed any evidence of a combination to fix prices among the different concerns that make quotations to us. We feel we get the benefit of a genuine and unrestricted competition for our purchases.

The president of a large bolt and nut industry, the basis of which is rod and bar steel (volume 20, p. 8042), says:

We have been buying from the Carnegie Steel Company, Jones & Laughlin, and the Republic Steel & Iron Company. Before buying bars and rods it is our custom to ask quotations from different makers. We buy two or three times in a year. The quotations on rods vary somewhat in price, about 50 cents a ton. They have been varying in that way to my knowledge since 1904. I never saw any evidence since 1904 of any combination to fix prices on our purchases. We have always got the benefit of competition on both of them.

The manager, since 1901, of the largest single gas company in the country (volume 20, p. 8085), says, in substance:

I am familiar with the purchases of iron and steel pipe made by that company since 1901. I decide which bidder shall be awarded the contract. During that period we have got quotations from 13 different companies—there are 11 at the present time we get them from. We let our contracts and award our orders on the competitive basis all the time. The quotations vary, and have done so ever since I have been connected with the company.

The president of a considerable tank manufacturing company (volume 20, p. 8127) testifies as to competition for his purchases, saying in substance:

We buy from the Carnegie Steel Company, Cambria Steel Company, Jones & Laughlin, and have bought some from the Eastern Steel Company; also from La Belle Iron Works. We find prices are nearly uniform from all companies in busy seasons, when the mills are busy. When the mills are not busy we get little concessions from most any of them, not to exceed $1.00 a ton, or something of that kind. I would consider it keen competition. I think we have had the benefit of the genuine, aggressive competition for our business. We have had a range of prices—take three years past, or for ten years—ranging from $1.10 to $1.50, and that, I think, is competition.

The same open competitive seeking after business of a steel-spring company that buys for its basic supplies large quantities of steel bars and billets is shown. Referring to the period from 1902 to 1913, its purchasing agent, in substance, says:

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We buy bars from the Carnegie Steel Company, the Inland Steel Company, the Cambria, and the Pennsylvania. The quotations vary. There has been competition ever since I have been connected with my business. We buy billets from most anyone that sells—New York State Steel, Carnegie Steel, La Belle Iron Works, Portsmouth Steel, Inland Steel, the Bethlehem, the Pittsburgh Steel Company, and the Republic. The quotations we have received on billets vary very materially. That has been so ever since I was connected with it. So far as I have been able to tell, there has been competition [87] in the billet business both as to price and on our part as to delivery. I certainly do think we have had the benefit of competition.

The president of a large coal-mining company, which uses light rails, testifies (volume 20, p. 8172) in substance:

As a rule, we buy on a competitive basis. In Pennsylvania we get quotations from the Carnegie Company, Jones & Laughlin, Cambria Steel, Pennsylvania Steel, and Bethlehem. I should say that under normal conditions there is a range in the quotations all the way up to a dollar a ton. That is when business is normal. There are times when we cannot get quotations from many of those rail companies. That would be times of great prosperity in the steel business. The conditions have been such as I have described since 1901. So far as I know, we get the benefit of real and genuine competition in our purchases of light rails.

The president of a very large jobbing company in semi-finished steel products testified in substance (volume 20, p. 8176) as follows to its purchases being competitive:

I have been familiar with the business since 1899. We deal in billets and slabs, steel bars, Bessemer iron, basic iron principally; malleable iron sometimes, some little foundry and coke. In the last ten years we have bought semi-finished steel from the Ashland Steel Company, the Portsmouth Steel, the Republic Iron & Steel Company, the Carnegie Steel Company, the Youngstown Sheet & Tube Company, the Allegheny Steel, the West Penn Steel Company, the Cambria, La Belle, Jones & Laughlin, Lackawanna, and Pittsburgh Steel Company. We buy on a competitive basis. It is competitive in a way. We know what the market is. We are not tied up to anybody. We buy outright and buy wherever we can buy the cheapest. There is a variation between the price as quoted at any particular time by the different manufacturers. It has always been so. There is competition in these products. It has always been so, as far as I know.

The manager since 1907 of a factory using various steel products, hoops, bands, angles, channels, sheets, wire goods, etc., which they bought from numerous companies, including

the Carnegie Steel Company, shows that the competition and price ranges have been greater in steel than in other metal products. In substance he says (volume 20, p. 8190):

The bids have not been uniform. On the contrary, they have varied. Since we commenced buying, in 1907, there was nothing in the bids or offers or the transactions between us and the sellers that indicated any combination or arrangement between the various producers or sellers of the different class of steel products I have testified as to bring about a uniformity of price. The variations in the prices of steel, as a rule, were greater than the variations in the prices quoted for us in copper, ingot copper, scrap copper, pig iron, scrap iron, tin, pig lead, and antimony.

The president of one of the large hardware jobbing concerns in the country, buying large quantities of sheets and plates from several companies, including the Steel Corporation's subsidiaries, in substance says (volume 20, p. 8229):

During the last ten years there seems to be a great deal of competition in sheets. There has not been so much in the sale of tin plate, of course, as in sheets, because there are not so many in the business. With regard to sheets, the competition has manifested itself by a sharp solicitation of our business, and we could always get very low prices from what we might term the independents. The quotations on sheets during the last ten years have been variant. Anywhere from $1 to $3 a ton. The quotations on tin plate have varied. The quotations on tubular goods are about the same as sheets, only [88] not so much so. The competition in the sale of tubular goods has been keen among the different manufacturers.

Without quoting him at length, we may say the purchasing agent of one of the great eastern railway systems (volume 21, p. 8568) shows that all the varied steel requirements of the road from a great terminal building to the spikes (with the exception of rail purchases, which were made by the president) were wholly in his control, and that there were constant variations in price and active competition for the railroad's purchases in all lines.

The purchasing agent for a western system (volume 22, p. 9071) shows the same course of virile competition for its purchases.

A large jobber in tin plate, building sheets, and other metals (volume 22, p. 8943) shows that the jobbing trade is done on narrow margins and that active competition is vital.

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His purchases during the last ten years were from different concerns, including the American Sheet & Tin Plate Company. He says in substance:

> There was, so far as I have seen, during the last ten years, competition. There has been competition in these products which I have purchased between manufacturers. It has been of a very active character. They changed their price quotations very frequently. It has been so during the whole period of ten years I spoke of. Sometimes a given concern would be higher and sometimes a given concern would be lower. Our purchases have been based on the lower quotations. The competition in our jobbing trade has been very keen. The margin has been very small. That necessitates our buying as close as possible. At the lowest quotation absolutely. We have done that. That explains our buying sometimes from one and sometimes from the other. That has been the case during the whole ten years.

Another jobber testifies (volume 21, p. 8979) as to competitive conditions in wire during the last ten years. His purchases included the American Steel & Wire and competing companies. He says in substance:

> There have been instances where the quotations we get from these concerns have agreed, but very rarely. As a rule, they vary. What would be termed appreciably; oftentimes to the extent of 50 cents to $3 a ton. I never recall a time when two quotations continued for any length of time to be the same. I am speaking now of the whole period of ten years. I never observed anything to indicate a combination between these manufacturers on prices. There was always competition. They had inducements of some kind to offer in the way of price or delivery.

We have carefully and patiently studied the voluminous testimony varying on the general course of all branches of the steel trade covering the whole time the Steel Corporation has been engaged in such trade. The testimony, as noted above, runs from volume 18 to volume 28, inclusive. It covers proofs by its manufacturing competitors in all branches, and also the different classes of customers whose trade it and its fellow competitors seek. It is apparent that among this latter class (that is, the consumers of its products) we would naturally find evidence of any throttling of competition, of any undue restraint of the steel trade. The typical extracts we have made above from varied sorts of buyers, of varied sorts of products, cover wide ranges of consumers. No one

can read these volumes of testimony and fail to be satisfied that this great body of business men, scattered [89] over all parts of the country, in keen competition with each other in their several lines, is alert in seeing that competitive conditions exist between the manufacturers of basic steel products from whom they buy. And the sworn testimony of these men, who are vitally interested in the maintenance of real competition between the Steel Corporation and its manufacturing competitors that such real competition does exist and has existed during the past ten years, cannot but carry a conviction that such is the case. A study of the testimony of these men, who are close to and vitally interested observers of the prices of these products, shows that a single large concern, by lowering the price of any substantial steel product it sells, can depress the obtainable price. It further shows that the converse is the case—that no single large concern, by raising or even maintaining the price of any substantial steel product, can raise the obtainable price. It further shows that the prices at which actual sales were made during this time in the steel trade depends on whether the consumption of steel was such that the mills were crowded with orders from buyers, or whether buyers were crowded with offers from mills. In other words, if the mills were crowded with orders, there was an increase of competition between buyers and a corresponding decrease in competition between manufacturers. On the other hand, if the mills were lacking in orders, then there was a keen competition between mill-men to get orders and corresponding decrease in competition among buyers to give them. The proofs further show that, when there is an increase of orders and a stiffening of prices, steel buyers are apt to buy at once, and this tends to further increase the price, but, on the other hand, buyers are not apt (volume 28, p. 11901) to buy at once when the price grows less, but wait until the bottom is reached, and this withholding of orders tends to accentuate the fall of prices. The proofs further show that in normal times, when ability to fill orders and ability to get orders are in fair balance, prices vary but little; but, as soon as that balance is disturbed, the tendency of prices up or down be-

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comes accentuated, and increased competition follows between the mills, if prices go down, between the buyers, if they go up. The study of these proofs, given by both mill owners and buyers of their product, satisfy us that this has been and is the course of the steel trade, and we are therefore justified from the proofs in concluding that the prices at which steel products have been bought from the Steel Company and its competitors have been fixed by business conditions—over demand or over supply. The proofs also show (volume 26, p. 11096) the same conditions and results prevail in the European steel market.

Assuming, then, that the iron and steel trade in the United States is and has been during the time here in question flowing in the natural and normal channel of demand and supply and of genuine competition, we next inquire as to what course the proofs show the Steel Company pursues in reference to such trade; in other words, is its course one of monopoly or in restraint of trade? Let us first ascertain what the practice of the Steel Corporation actually was and is as to prices. Whether that course be right or wrong, whether it be in violation of [90] the letter or spirit of the Sherman Law, there can be no uncertainty in three things: First, what its policy is; of its having been openly and publicly avowed; and, lastly, of its having been followed. Its avowed general practice in regard to prices is thus summarized (volume 12, p. 4771) by its chairman, Judge Gary, who says:

"The United States Steel Corporation has endeavored, so far as it could, to prevent the unreasonable increase of prices. It has been a decided factor from time to time in keeping prices down to a level which was believed to be fair and just. Prices generally are controlled very much by the business conditions of the country. The ordinary laws of trade and supply and demand fix the general prices of commodities, but the Steel Corporation has endeavored to prevent sudden and violent fluctuations downward by its advice, but more particularly by its own action in fixing its prices, and has endeavored to prevent the unreasonable increase in prices at times when the demand was greater than the supply and there was a general disposition in the trade to take advantage of these conditions and unduly increase prices."

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That it has followed this policy is the testimony of both its competitors and customers. Thus a manufacturer of agricultural implements, buying bars and plates both, in Bessemer and open-hearth (volume 20, p. 8314), says:

"Our experience has been that, on advancing markets, the Carnegie Company were as low and frequently lower than competitors, while on declining markets they were generally a little higher."

Another manufacturer, a buyer of structural shapes and other products (volume 24, p. 9963), testifies that when prices are advancing the Carnegie Company is the last one to advance, and when they are declining it is the last one to decline. That this course has an absolute effect in steadying the market, and that every manufacturer buying plain material and fabricating it and being himself a bidder on the work prefers a steady market.

The president of the largest chain factory in the country (volume 21, p. 8763), and who was a large buyer of rods and bars, testifies that in his judgment the American Steel & Wire Company has, in several instances of boom times, prevented a runaway market; that many times manufacturers in that line have told him that if it were not for the American Steel & Wire Company the prices would advance, but that they could not get them to advance their prices.

A very considerable Southern hardware man (volume 25, p. 10373) testified that in dull times the Steel Company's prices were higher than its competitors, and that it did not go to the low quotations its competitors did; that this had an effect in steadying prices; that this is a benefit to buyers in that it removes the speculative feature.

Another large Southern hardware dealer (volume 25, p. 10720) and other buyers (volume 23, p. 9483) testify to the same effect. The testimony of competitors is to the same effect. Thus James A. Bowron, one of the leading Southern manufacturers (volume 25, p. 10427), testifies that they always knew what the prices of the Steel Company were; that they did not say their price was one thing and make it another; that their course was eminently conservative and the principal barrier against chaos. He testified that the Steel Company had stood [91] in its own light in refusing

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to advance prices when in his judgment the market justified advances. He adds:

"I think, if I had been a stockholder in the Steel Corporation, I would have felt several times that it was failing to earn the money for me that it ought to have done by advancing prices."

The fact of such policy and the reasons for it are thus summarized by Charles M. Schwab (volume 11, pp. 4157, 4158):

"While I was president of the Steel Corporation, I should say that our prices as a rule were somewhat above the other prices in depressed times and below the other prices in prosperous times. In other words, we endeavored to keep more uniform. * * * The theory was that many smaller dealers bought their steel from this corporation; that we did not want them to be speculators, nor did they want to be speculators, as it were, in the price of steel; that as a rule they were caught with big stocks when prices were high, and made heavy losses by reason of rapid reductions and the inclination to overbuy when prices were low; and, if prices were kept nearly uniform, people buying steel would buy for their requirements and not speculatively."

The proofs also show (of which volume 26, pp. 11096, 11074, 11248, and 10928, may be cited as examples) that this policy, which is also followed by other large steel manufacturers, largely resulted in doing away with what are called delivery premiums; that is, of postponing deliveries of orders already taken at lower prices and giving the preference to orders taken later at higher prices, which higher prices were in effect obtained under the guise of so-called delivery premiums. The proofs likewise show that the lessening of extremes in the prices of basic steel products greatly benefits mills and factories that further fabricate such articles. Thus (volume 21, p. 8847) one such witness testified:

"Of course, I am only a small manufacturer and, perhaps, to a certain extent, typical of the average small consumer of steel products, but the conditions in the present decade are far more stable and far more favorable to intelligent manufacturing than they were in the previous period. Of course, the fluctuations have been less, and you can calculate on your road which you have to go over with a good deal more certainty. * * * The sudden fluctuations, rising and falling in prices, were very unfavorable to the maintenance of contracts or to intelligent manufacturing. One could not buy and be sure that he could get out with a profit on account of the dips in the market."

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The proofs show that the practical effects of this policy are that in prosperous times buyers are apt to buy from the Steel Corporation and in depressed times from its competitors. Whatever the wisdom or unwisdom of such a policy may be, we find no proof tending tc show that it tends to monopolize the steel business or to unduly restrain trade or to prejudice the public. There is no proof that it in any way interferes with the right of any other person in the steel business to fix his own price on his own steel product. The proof shows that the Steel Corporation, in the exercise of its own business judgment, has elected to publicly announce its prices, to adhere to them with all buyers alike, and to give timely notice of its purpose to change them. It is neither the duty or the province of this court to express any opinion upon such policy, unless we are satisfied, as laid down by the Su[92]preme Court, "that it prejudices the public by unduly restricting competition or unduly obstructing the course of trade," and of this we have no proof. For, as we have seen, the testimony of those engaged in the steel trade is that this policy of the Steel Corporation, in refusing to raise prices, has not restricted competition or obstructed the course of trade, but, on the contrary, has tended to prevent prices from rising to what was aptly termed a "runaway market." And in this connection it is just to note that if the Steel Corporation, in refusing to advance its own prices, prevented other manufacturers from advancing theirs, it was only exercising a veto power (volume 8, p. 3199; volume 6, p. 2144), which every one of many other competitors possessed, and was following a policy which was also followed by other large competitors (volume 6, p. 2108), who were also opposed to advancing prices. It is also just to say that in giving timely notice of its purpose to change them and, in giving publicity to its prices, in adhering to them, it will be seen on reflection that the Steel Corporation has adopted a policy of price publicity and adherence somewhat analogous to the freight-rate stability followed by the railroads under the directions of the Interstate Commerce Commission, which published their rates and only changed them on notice.

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We now turn to the other phases of this policy, viz, the corporation refusing to sell at lower prices when prices dropped. That it did so, and that by reason thereof it lost business, which naturally went to those who did lower their prices, the proofs abundantly show. Of its right to refuse to sell at lower prices, provided it does not force others to do the same thing, there can be no question. This brings us to the question: What was the policy of the steel trade prior to 1901 under such conditions, what was its result, and what evils are avoided by this change of policy?

In that regard, the testimony leaves no doubt. We take the Carnegie Steel Company's course in the earlier steel period as illustrative, not only of its policy, but as fairly typifying that of its competitors as well. The cause of falling steel prices is, of course, that there are not enough orders to cover the production, and this leaves two courses open to the steel manufacturer: He must either shut down his mill or go after orders to keep it running. The policy of the Carnegie Company (and in that respect it was the same as others) was to try to keep the mills going, no matter what price they got for their product, or no matter whether their getting such orders meant the complete stoppage of their competitors' mills. Practically applied, this policy meant a fierce, ruthless price-cutting trade war, the practical results of which were that, if these low prices enable one company's mills to get the orders to run its mills, the taking of these orders from other companies' mills and other sections of the country shut them down. Thus, in Government Exhibit (volume 11, p. 4279) we find a letter from Mr. Carnegie to the Carnegie Steel Company, embodied in its minutes, reciting such policy:

"In the former depressions we announced our policy, viz, take all orders going and run full. Our competitors believed we meant what we said, and this no doubt operated to clear the field. One after another dropped out; finally Pennsylvania Steel dropped out and only a few remained who could meet the lowest prices."

[93] In volume 11, p. 4266, another letter of Mr. Carnegie to his company is given in evidence in which he says:

"My view is that sooner or later Harrisburg (Pennsylvania Steel Company), Sparrows Point (Maryland Steel Company), and Scran-

ton (predecessor of Lackawanna Steel Company) will cease to make rails like Bethlehem (Bethlehem Steel Company). The autumn of last year seemed as good a time to force them out of business as any other. It did not prove so. The boom came and cost us a great deal of money."

The policy of taking orders, even without profit, was the destructive competition of that era. "To keep running [Government Exhibit, vol. 3, p. 1036], not to make profit, is the point we should steer to," was the direction to the Carnegie Steel Company. "Take every order, otherwise we come to a stop and only feed competitors who would close if we went to rock prices." Such being the policy, the proofs leave no doubt as to its effect. Mr. Schwab (volume 11, p. 4191) testified: That the destruction of the small and weak (competitors) was a practice not unknown in the old days. It was rather extensively carried on. It was at times with quite effective and marked results. That he did not know what percentage of them emerged from the steel wars in the old days. Not many. There were more gravestones than live competitors. That (page 4155) they did everything they could to secure all the business they could secure, regardless of the price at which they secured it. That it was pretty hard on the competitors at times, but that was their policy and one that it was very difficult to break away from.

Speaking of that policy, Judge Reed (volume 14, p. 5671) says:

"The policy of the Carnegie Company was to go out and get business, to take it wherever it could get it, and keep its mills running full, and run regardless of the feelings or prosperity of its competitors."

The result of the rail-cutting prices, as testified to by Walter Scranton of the Scranton Iron & Steel Company (volume 8, p. 3200), was that the price of rails was forced down to $14 a ton; that this was below the cost of manufacture; that, as a result of this war, his company was driven to abandon their mills at Scranton; and that wages were forced down to the lowest they had been for years. And as a practical example of this era of trade war competition and ruinous price-cutting, we have the testimony of

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Frank S. Witherbee, who, referring to the Troy Steel & Iron Company (volume 18, p. 7296), says:

"The Carnegie Steel Company drove that company out of business. It drove it out of existence, not by the use of the ores. I think the cost of pig iron was lower at Troy than it was at Pittsburgh. It drove it out of the business by its policy of going to our customers and telling them to get the best price they could from us and they would name 50 cents a ton lower."

Referring to one of these ruinous trade wars between two large steel companies, Powell Stackhouse, president of the Cambria Steel Company, which was not one of the participants, testified (volume 4, p. 1706):

"Q. How nearly can you fix the time of what you called the Gates and Carnegie row?—A. That was somewhere in the '90's; in the latter part of the '90's.

"Q. About 1897, or somewhere along there?—A. Somewhere along there; from 1895. I would not be sure of that.

[94] "Q. And that was followed, I judge, from what you say, by rather a fierce trade war lasting a year or two?—A. Yes; in all lines of steel.

"Q. In all lines of steel?—A. Yes; everything. As a result of that, there was the keenest competition and steel was sold, bar steel, at, I think, less than nine-tenths of a cent.

"Q. And it cost more than that to make it?—A. Yes; a good bit more.

"Q. And the consequence of this was very serious to the trade, was it not?—A. It was serious to everybody in the trade. It was very serious, for instance, to the warehousemen, that had some thousand or more tons of steel, or whatever they might have on hand. Their stocks were probably reduced from one or two cents a pound way down.

"Q. That warfare left a trail of ruin?—A. Yes; it did.

"Q. There were a great many failures on account of it?—A. Yes.

"Q. And general business disaster?—A. General depression.

"Q. And business disaster?—A. Yes, sir.

"Q. And failure and bankruptcy?—A. Yes, sir.

"Q. (continuing) —were the direct effect of it, were they not?—A. Yes.

"You had had trade wars before, I suppose, had you not?—A. Yes.

"Q. But none so severe as that?—A. None so severe as that.

"Q. But they were always attended with injury to the business, and especially to the warehousemen or middlemen, were they not?—A. Yes, sir. The middleman had bought and had his material on hand, and, overnight, by the price falling a few dollars a ton—

"Q. (interposing) He was ruined?—A. He was ruined in some cases. Some of them carry very large stocks.

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"Q. The effect, I suppose, of such warfares, and particularly the Gates and Carnegie warfares, was felt mostly by the weaker concerns in the business?—A. We all felt it.

"Q. You all felt it, but the stronger ones weathered it?—A. Certainly.

"Q. And the weaker ones all went to the wall?—A. They were weakened so that they gradually dropped out.

"Q. They gradually dropped out?—A. Yes, sir.

"Q. So the effect of that was not confined to the manufacturers, but was felt even more by the warehousemen and jobbers, was it not?—A. Yes. They could measure their loss at once. If they knew what their inventory was and the difference between what they paid and what prices had fallen to, they could measure their loss at once.

"Q. What about the retailers? What was the effect on them?—A. The same thing. Anybody that carried a stock of steel or iron on hand, if the value of that stock was reduced $5 or $10 a ton, just simply had to write off that amount."

Indeed, the general competitive policies of the steel companies toward each other is well summarized (and this summary is justified by the proofs) by the chairman of the Steel Corporation, who (volume 12, p. 4777) says:

"On the other hand, in olden days, the rule in this country was different in this line of business. I have no doubt the suggestion of Mr. Carnegie, which was read in court a few days since when I was present, represented [95] not only his views, but the views of his associates, and the views generally held amongst those who were in charge of the iron and steel industry of this country. There was a competition that was bitter, fierce, destructive. If it did not absolutely drive competitors out of business, it so harassed and injured them as to prevent them from extending their business, or from taking advantage of their location, and at times compelled them to close their mills, discharge their employés, and disrupt their organization, and, in fact, was a competition that, in the opinion of those in charge of the United States Steel Corporation, I might say the opinion of those in control of the industry generally in this country at the present time, was calculated to destroy, to injure instead of build up, to prevent extensions of trade, to limit the capacity or the opportunity of many who were engaged in the trade."

In that connection, and in corroboration of what the chairman says, the testimony of others (Reed, volume 14, p. 5692; Roberts, volume 13, p. 4997; Farrell, volume 10, p. 4058) should be noted. This is summarized by Robert Bacon, who (volume 14, p. 5494) says:

"The facts are that the policy of the company from the beginning has been to change the old method of dealing with competitors. Judge

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Gary, who has done more for the United States Steel Corporation in its development and the benefits it has brought all hands than any one man since its formation, has made it a cardinal point of his policy, and has tried his best to inculcate it upon all the sub-companies that there was a new order of things, that there were new rules of the game in dealing with competitors, as well as in other human relations. Judge Gary has talked from the very first and has tried to compel the actions of all the others in the corporation toward dealing fairly and decently with competitors, as being the only way in which any kind of stability in prices or of conditions could be maintained. He has, from the beginning, preached and practiced the fairest kind of dealing with his competitors, keeping them informed, as far as he legitimately could, of all the conditions of the Steel Corporation, and by doing so has gradually acquired a degree of confidence that in my opinion has never existed before amongst competitors. The old conditions have changed; the old destructive and ruinous and ruthless warfare of the early days of the iron and steel industries has disappeared; by reason of the attitude of Judge Gary more than anyone else, a condition has been produced among competitors in the iron and steel business, and, I believe, in many other industries, that never before existed."

And in that connection it should be noted that no testimony has been produced in this record that a return to the old trade war system of ruinous competition would, as a matter of fact, benefit the public interests. On the contrary, the proof is that present business methods and ethics are more to be desired. As expressive of the view of those in the steel business who are not connected with the Steel Corporation, we may note the testimony of the president of one of the largest steel castings companies in the country, who (volume 20, p. 8067) says:

"Before the formation of the Steel Corporation, business ethics, I might say, were in very bad shape; competitors had no confidence in each other; they resorted to subterfuges, misrepresentation, and false statements. That same lack of confidence existed between sellers and many purchasing agents. It was a very undesirable condition in which to do business. For the past seven or ten years (in later times, at any rate) all that misunderstanding or misgiving has been displaced by manly, straightforward dealing. I do not think it could have been brought about without the Steel Corporation's influence and example. The benefit of that example has extended into collateral industries like ours. I have noticed an improvement in the competition of our own business in an ethical way. We still have the competition, but we do not try to misrepresent or tell lies any more. We

are honestly friends now. Then we pretended to be friends, but were the bitterest enemies. It appears to be an improvement that pervades the entire steel line, and being [96] the largest unit, the most influential unit, and setting a commendable example, has led us all to realize that it is a betterment."

A study of these proofs satisfies us that, apart from all ethical questions, the strong trend of the steel business at the close of the last century was toward driving competitors out of business by cutting prices, and that the business policy inaugurated by the Steel Corporation (volume 14, pp. 5670–5673; volume 13, p. 5218; volume 12, p. 4777; volume 14, p. 5717), and in which policy its competitors subsequently followed, has resulted, in the ten years of its existence: First, in a more general division of business between all competitors in the steel business than under the older system; second, in tending to minimize the shutting down of its own and its competitor's plants in times of depression; third, it has made steel products non-speculative, and has therefore benefited all dependent iron and steel manufacturers by enabling them to have a steady, non-speculative supply of those basic steel products on which their plants depend for operation. The evidence on which these conclusions are based is corroborated by the business facts and business results in which we now summarize in the working out of this policy for ten years by the Steel Corporation and its competitors. During that time the business of both competitors and Steel Company has increased very largely, but it is highly suggestive, indeed, conclusive, proof that the Steel Company had neither monopolistic control or power to restrain trade, since, the proportion of trade increase was very materially greater on the part of the Steel Corporation's competitors than its own. These significant figures prove that mere size, or bigness of business, is not necessarily a monopoly of business at the expense of all others engaged in it. And in that connection, and as aptly expressive of our views, we may quote with approval the language of Judge Hook of the Eighth Circuit, in his concurring opinion in the *Standard Oil case* (C. C.) 173 Fed. 196:

"Success and magnitude of business, the rewards of fair and honorable endeavor, were not among the evils which threatened the public

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welfare and attracted the attention of Congress. But when they had been attained by wrongful or unlawful methods, and competition had been crippled or destroyed, the elements of monopoly are present.

In the most important element of steel rails, an item on which great stress has been laid as a most important factor of monopoly, and control of prices, we find that, in spite of the general increase of rail production, the Steel Corporation's relative proportion of rail business has fallen off nearly 8 per cent, while its competitors' had increased correspondingly. In the great basic item of steel ingots, on which the great bulk of steel manufacturing rests, while the Steel Company's ingot business increased 44 per cent, its competitors' ingot business grew nearly three times as fast, viz, 137 per cent. To say that any monopoly of ingots existed when this bill was filed, that it now exists, or that it can exist is simply to run counter to the testimony of ten years' business experience and to the evidence in this record. In the great item of structural shapes, which enter into bridges, building, and other common uses, while the business of the Steel Company in these years increased nearly one-half, to be exact 42.7 per cent, its competitors have, [97] during these years, gone ahead nearly four times as fast, 164.4 per cent, and in that connection it will be observed, as heretofore shown, that a large part of the increase of the Steel Company's structural product was in the foreign, not in the home, market, in which latter market it has more than 300 fabricating competitors. Practically the same proportions exist in wire rods, the basic of wire fences, and other articles of widespread use. In wire rods the Steel Corporation has increased its business 49.7 per cent; its competitors 182.2 per cent, nearly four times as fast. So also a monopoly of the tin-plate industry was feared, while the outcome shows the Steel Corporation has in tin plate and terne plate increased 63 per cent, its competitors have increased threefold as fast, viz, 186 per cent. So in the pipe industry. Instead of their being a monopolistic and exclusive growth, there has been a relative retrogression, for, while the pipe business of the Steel Corporation has largely increased (in wrought pipe 36 per cent and in seamless tubes 100 per cent), its competitors have increased nearly six times as fast (in wrought pipe

209.9 per cent and in seamless tubes over seven times as fast, 750 per cent). In the item of pipe alone, it has already been noted in the testimony of the general manager of a great gas company that, as a buyer of pipe, it enjoys active competition between 13 concerns.

These facts and figures conclusively answer the charges of monopoly and restraint in the home market. We are therefore justified in answering in the negative the question to which the foregoing part of this opinion is addressed, namely, Was the United States Steel Corporation at the time this bill was filed, then prejudicing the public interests by unduly obstructing the steel and iron business of the United States?

[3] We turn next to the steel and iron trade with foreign nations and address ourselves to the second question, namely, Was the United States Steel Corporation, at the time this bill was filed, then prejudicing the public interests by unduly restricting or unduly obstructing the steel and iron business with foreign nations?

In taking up that question, it is to be noted that the entire foreign business here in question is now carried on, not by the Steel Corporation, but by a subsidiary of the Federal Steel Company (volume 10, p. 3775), called the United States Steel Products Company. This company was formed in 1903, and the Federal Steel Company is the owner of its stock. This Products Company is not made a party to this bill, and there is no prayer for its dissolution. All other subsidiary companies of the Steel Corporation are made parties, and their dissolution in many cases prayed for. Whether the omission of the Products Company from the bill, and the absence of any prayer for its dissolution, was an omission, or was advisedly done, with the purpose of conserving its foreign trade, does not appear. But the absence of a formal prayer for the dissolution of the Products Company is, however, of no practical importance, for the continuance of such foreign trade of the Products Company is manifestly dependent on the manufacturing facilities, the product diversity, and the financial ability of the Steel Corporation. If, therefore, the Steel Corporation be dissolved by this

court, the Products Company will be divested of the practical commercial [98] power of continuing its foreign trade, since the proof is (volume 10, pp. 3844–3879) that 80 per cent of the goods it sells necessarily (volume 6, p. 2215; volume 12, p. 4731) comes from the Pittsburgh District in which the Federal Company has but little production. If the Federal Company be also dissolved, then the Products Company will, of course, be left without any mills or plants which are so located (volume 10, p. 3829) as to do export business, but 2 per cent of the Federal Steel Company's product now going (volume 10, p. 3829) into foreign trade. So that the foreign trade of the Products Company, if acquired and held in violation of the Sherman Law, can be as effectually ended by a dissolution of the Steel Corporation, or the Federal Steel Company, as though the Products Company had been made a party to this proceeding and its dissolution prayed for and decreed.

It is apparent that the monopolization and restriction of foreign trade must, in the nature of things, consist of either taking away from others a foreign trade which already existed, or if such foreign trade was not in existence, then in building up or maintaining such foreign trade by preventing or restraining others from entering it.

Now foreign trade is not a mere general, theoretical abstraction of selling abroad, but is a concrete, definite, commercial business proposition in iron and steel. We have our domestic trade, which consists in supplying domestic use or consumption. And such domestic use necessitates one having or taking to the market where his customer is located the article the latter wants to buy. It goes without saying that if one man has a wire mill at Pittsburgh situate near another man's billet mill, and that billet mill has in its warehouse at all times an ample supply of billets to run the wire mill (the proofs, volume 10, p. 3773, show 18 different analyses of such billets are required), the wire-mill owner will prefer to deal with, and will deal with, the billet mill in Pittsburgh in preference to dealing with one at Chicago. And this is so, because freights are eliminated (volume 10, p. 3987); uncertainties of railroad transportation are avoid-

ed; if materials prove faulty or not of the right metallic character (volume 10, p. 3773), the mischief can at once be remedied. Of course, if the Chicago mill, from any motive, chooses, either from over-production, business needs, or other causes, to offer the wire mills at Pittsburgh billets at a lower price than the Pittsburgh mill, a sale might be made; but this occasional purchase could and would result in no established, normal trade between the Chicago billet mill and the Pennsylvania wire mill. The only way such normal trade relation could be established would be by the Chicago manufacturer locating a permanent stocked warehouse near the Pittsburgh wire mill. If its cost of production was so low and it could pay the freight from Chicago to Pennsylvania, and could furnish in quality, quantity, and price the same product as the Pittsburgh mill, then, and then only, could it hope to have normal, continuous trade with the Pittsburgh wire mill. We take this homely but suggestive illustration to emphasize what the proofs show are the demands and requirements in foreign iron and steel markets which confront an attempt to enter them, and that such market is not to be held by the mere occasional shipping of goods to foreign countries. Moreover, in considering the possible range of for[99]eign iron and steel markets for American iron and steel, there must first be excluded from that market, Germany, France, Austria, Italy, and Russia. The proof is (volume 10, pp. 3846, 3847) that the tariffs of each of those countries prevent the sale there of American iron and steel. The proofs also show (volume 10, pp. 3827–3849) that the attitude of the English public and the hostility of English labor organizations toward American iron and steel likewise prevent American iron and steel products entering England, save wire fences, the manufacture of which is only now being taken up there. It follows, therefore, that the iron and steel trade of the United States with foreign nations must be largely built up in other parts of the world, and such has been the outcome of the efforts of this company as shown by the proofs. Referring to trade in such nations as are not closed to the iron and steel business by their tariffs, these in a general way are the steel markets of Asia,

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Africa, the British Colonies, all South America, Cuba, and Mexico. But while these markets are open, they were, when the Steel Corporation was formed (volume 10, p. 4125)—

"practically pre-empted by foreign manufacturers and foreign merchants; that is, principally continental concerns, English concerns, as well as having branch offices and warehouses in all of the consuming markets of the world. It was a very difficult thing to enter those markets. The European manufacturers had been established in the markets of South America, Asia, Africa, and the Orient, some of them over 50 years. There was not only a prejudice, but a hostility, in most cases against newcomers in the trade. In order to get a foothold in these markets we usually had to sell below the prices of the concerns that were established there, and who had their customers and native salesmen, and all the advantages that go with a long occupation of a business in any foreign country. It is more the custom in foreign countries than it is here for people to attach to themselves customers that buy from them regularly."

Moreover, the proofs (volume 10, p. 3842) show, and such would seem to be the manifest commercial fact that:

"It is impossible to develop a foreign business unless it is done continuously. Buyers will not patronize people who are not in a position to give them a continuous source of supply."

Without entering upon a discussion of other matters, it sufficies to say that, not only were these foreign markets pre-empted and tenaciously held by foreign manufacturers, foreign merchants, and foreign bankers who refused to finance importing enterprises there unless there was (volume 10, p. 3833) a stipulation that all materials should be bought in such bank's own country, but the markets required the maintenance of varied lines of products, the only way to supply which varied lines was by maintaining varied lines of finishing mills at home and the maintenance of large warehouses (volume 13, p. 4974; vol. 11, p. 4139) abroad. The proofs in the case show that in 1901, when the Steel Company was formed, with the exception of wire exportations—which for various reasons (volume 10, pp. 3792–3790–3791) was not broadly successful—there was no iron and steel trade of an established or continuous character between American iron and steel manufacturers and foreign nations. It is true there were spasmodic exports which at times amounted to considerable volume, but they were not continu-

ous or sustained, and they resulted in no established trade or dealing. In [100] deed, in many cases the nature of this spasmodic trade (volume 10, p. 3842) was such as to create a hostile feeling toward any subsequent effort on the part of American iron and steel trade to enter the same foreign market. The proofs show that at that time and for many years previous, so long as the demand of the home market was sufficient to absorb their product, our iron and steel manufacturers made no effort to sell their output abroad. When, however, the reverse was the case, and they had on hand a surplus product for which there was no domestic trade, they went into the foreign market and tried to get rid of such surplus product there. The European and American steel and iron market being inter-related (volume 28, p. 12013), the proof is that, in addition to paying the freight to get his goods to the foreign market, the American manufacturer had, in order to get customers away from the foreign manufacturers who were already in possession of such trade, to cut the price when they sold in the foreign market. This spasmodic course grew to be known in the steel business as "dumping" (volume 10, pp. 3843, 3846, 3993), and may be well likened to the bargain sales by which a merchant seeks to dispose of a surplus stock which he cannot sell at normal prices. It will, of course, be obvious that a manufacturer could not continue such low-price dumping any more than a merchant could dispose of all of his stock—instead of his surplus stock—at bargain prices. The proofs (volume 26, p. 11096) show the same course of dumping abroad in times of depressed markets was followed by European steel manufacturers in our market. The then status of American steel manufacturers is shown by the proven experience of the Carnegie Steel Company. It was the most aggressive of any of the steel companies to enter foreign trade, exporting 70 per cent of the then steel exports (volume 11, p. 4345). The Carnegie Company's location, facilities, and freight rates enabled it better than most other companies to enter foreign trade, and from its works, as the foreign trade of the Steel Corporation developed, such trade to the extent of (volume 10, p. 3845) 24 per cent of the entire

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product of the Carnegie Company goes into such export trade. It will therefore appear that the Carnegie Company can be fairly regarded as the best fitted of American steel companies to compete for export trade. Referring to that time, the president of that company (volume 11, p. 4139) testified:

"We had made spasmodic attempts at it. In dull times when business could not be secured at home, we would make attempts at foreign business by going in and making an unusual price, which was the only way that any foreign business could be secured then, inasmuch as we had not an established business or business connection, and therefore customers were not inclined to buy from a firm who could only furnish them occasionally."

The relation of the Carnegie Company to foreign trade is shown by its minutes, etc., as they appear in Gov't Exhibit, vol. 3, p. 1134. From the proofs in the case three things seem settled, namely: That when the Steel Corporation was formed American steel manufacturers had no real dependable export trade abroad; that such sales as they made were spasmodic, made with a view to dumping surplus product; and such sales were secured by underselling the European market when they had no home market. It will also appear that being ex- [101] cluded by the steel tariffs of Germany, France, Russia, Austria, and Italy, and by other causes from England, such dependable foreign markets as were open for them to build up, as will be seen later, had to be found in other parts of the world. This summary of the situation is warranted by the study of the proofs.[a]

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[a] We may add that, wholly apart from the record, a reading by us of books, articles, and addresses on the subject of foreign trade satisfies us that the evidence of those who have in this record testified on the subject are in harmony with the views expressed in current literature of the steel trade. From that reading we have selected, as expressive of the then attitude of the American steel trade toward the foreign market, an article by James M. Swank (whose reports of statistics, Defendant's Exhibit, vol. 3, p. 145) have been received by all parties to this record as reliable. In an article on the Future of the American Iron Trade, in the Engineering Magazine of 1895 (volume 10, p. 613), Mr. Swank says:

"Except in periods of excitement, like that which prevailed last summer, our capacity for the production of iron and steel will be greater than the home demand. This fact, joined to the cheapening of

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Seeing, then, that when the Steel Corporation was formed, no such volume of foreign trade in steel existed; that the acquisition of any part, or indeed the whole of it, could constitute a restraint of trade with other countries; and seeing that the foreign trade which the Steel Corporation had during its earlier years had increased from approximately $31,000,000 to $91,000,000—we turn to the next question, Did the Steel Company acquire this original or additional trade by monopolizing or restraining foreign trade, or attempting to do so; or, on the other hand, was its acquisition the natural and normal growth of fair business effort? We have said the foreign trade of the Steel Company in 1911 was $91,000,000, but of that amount some $30,000,000 is really not solely its own, but was shared by it with other American steel manufacturers. To explain, it will hereafter

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all iron and steel products through competition, has led many of our manufacturers to look to foreign markets to absorb our surplus products or to employ our surplus capacity. An examination of our export statistics for many years shows that this is a delusive hope."

Mr. Swank then takes up our iron and steel exports for many years. He shows that during the 15 years following 1870 there was no progress whatever; that during the next six years it increased rapidly when a decline began, followed the next year by a slight increase. He called attention to the fact that, included in our iron and steel exports have been a number of things, such as machinery, boilers, hardware, sewing machines, saws, tools, locomotives, etc., which formed the principal part of our iron and steel exports; that out of $30,000,000 in the aggregate of such exports, less than $400,000 was pig iron; that plates and sheets were less than $200,000; that nails only amounted to $500,000, and iron and steel rails about the same amount, ending with this statement: "The other products of our rolling mills and steel works forming an infinitesimal part." He then says:

"It is evident that our iron and steel manufacturers as contradistinguished from the manufacturers of machinery, hardware, saws, tools, sewing machines, locomotives, and other finished articles have little to hope for in foreign markets under present conditions or those which have recently prevailed."

The conclusion of his whole article is this: "It follows from what has been said that American iron and steel manufacturers must look almost entirely to their own country for the employment of the productive capacity of their iron and steel works, and that, if this capacity cannot be properly utilized, some of it, as in the past, must stand idle or be abandoned. The fittest works will survive. For these there will be sufficient employment."

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appear that in the develop [102] ment of a foreign steel trade, the Steel Corporation has established agencies, warehouses, freight communications, and other exporting agencies in many markets of the world. As we read the testimony (volume 11, pp. 4471, 4472), in reference to this $30,000,000 of foreign trade, it seems that if an American manufacturer of steel finished products, for example, locomotives, oil tanks, gas tanks, cars, etc., had an inquiry, or desired to make a bid to furnish such goods in some foreign country, where such manufacturer did not have, but the Steel Corporation did have, a representative, the Steel Corporation would, on request, ascertain and report to the American tank manufacurer what price he would have to put on his tanks, etc., to get into the desired foreign market. The ability of the tankmaker to meet such foreign competitive price in the prospective buyer's market depended, amongst other things, on two items—the cost of the sheets from which his tank was made, and the freight cost of delivering the tank. In case the current prices of such sheets in the American steel market were such that the tank-maker could not sell his tank low enough to compete with the foreign bidder the Steel Corporation would agree to furnish the plates at such lower price as would enable the tank-maker to underbid his foreign competitor. This price reduction, coupled with the fact that the Steel Corporation would forward the tanks with its own freight, enabled the tank-maker and the Steel Corporation to thus jointly sell the tank, which neither could do alone. By such operations, where it made the basic material, but did not make the finished article, the Steel Corporation, in 1911, thus did $30,000,000 in trade abroad in finished steel products in coöperation with other American manufacturers. The proofs show that this course of price reduction was followed in order to induce American manufacturers of finished steel products to coöperate with the Steel Corporation in extending the latter's foreign trade. The uncontradicted proof in that regard is that these foreign reduction prices thus given to American manufacturers to enable them to compete in the foreign markets were open (volume 11, p. 4472)—

"to all comers; anybody that wanted to develop a foreign business received our assistance, not only in the way of special prices, but we

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would lend him a salesman in a foreign country and place our office at his disposal and help him in every way to build up a foreign business * * * (volume 10, p. 3835). Our office is an encyclopædia for the manufacturers of the United States, particularly in iron and steel and those collateral lines. We have never hesitated to give information with regard to conditions in countries, and the credit of people whom we may have been doing business with, and especially facilities and information generally with regard to tariffs in countries and railway facilities for internal distribution generally. * * * (volume 10, p. 3836). I had prepared under my direction a list, I think, of about 158 manufacturers to whom we have made a special allowance in order to enable them to develop a foreign business."

The proofs show (volume 10, p. 3848) that this large volume of business, termed by the Steel Company "re-export" business, and amounting, as stated, to $30,000,000 in 1911, was shared in by 158 other firms or companies, and in making such re-export articles from 15,000 to 18,000 men were employed. The proof is (volume 10, p. 3885) that on ocean freights the Steel Corporation had no rebate or advantage over [103] its competitors. It will be observed that in thus reducing the price of basic steel materials to enable manufacturers to enter the foreign markets, the Steel Corporation has pursued the same helpful course of lower freights for exports which the Interstate Commerce Commission has, since 1903, approved of the railroads doing. In that regard the proofs show (volume 11, pp. 4474, 4475)—

"If a shipment is made from Pittsburgh to New York under a bill of lading beginning and ending with Pittsburgh and New York, that where it is known that it is going to be exported the rate is less than when it is known it is going to stop in New York; the tariffs are published. * * * There is an export rate and a domestic rate, and the Government has encouraged the export business to the extent of permitting the Interstate Commerce Commission to make export rates. The export rates have been in effect since 1903."

And we may add the proofs (volume 10, p. 3933) show that the Interstate Commerce Commission has gone to the extent of differentiating among different articles for export, making freights on export rails lower than on other export articles. We may here say that the Interstate Commerce Commission and the railroads in thus coöperating with the Steel Corporation, and these other manufacturers in allow-

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ing lower freights from interior points to the seaboard on goods intended for export, has followed the policy adopted in European countries. In that regard the proofs (volume 28, p. 12037) show:

"The German Government and the German railroads help for the export of finished products, but they charge the full domestic rate for any finished product that is imported."

Passing on, then, from this $30,000,000 of the foreign trade which the Steel Company has created for itself by inducing domestic consumers of its basic products to jointly enter into a foreign trade, and considering the other foreign trade, $60,000,000, which is its own, we examine the evidence as to whether the creation and building up of this, its own foreign trade, involves monopoly or restraint of trade. This becomes all important, because the Steel Corporation contends that the creation and building up of a foreign steel and iron trade was one of the controlling reasons that led to its formation, and not a purpose to restrain or monopolize interstate home trade. In that regard the contention of the Steel Corporation is that no such foreign steel and iron trade could be built up without the large resources of the Steel Company (volume 10, pp. 3790, 3791), and the varied products which the integration and combination of its units alone made possible. The mere statement of this contention shows its importance, for if the twofold purpose of this statute is to foster and protect trade, both foreign and interstate, and if foreign trade cannot be increased without some such mechanically varied and financially strong agency as this Steel Corporation, then manifestly such agency is not a violation of a statute whose purpose was to permit—not to prevent—the normal, natural, and to be desired development of unrestrained, unmonopolized trade, both foreign and domestic. In taking up this question, we dismiss once and for all the question of mere volume or bigness of business. The question before us is not how much business was done or how large the company that did it—the vital question is how was the business, whether big or little, done—was it, in the test [104] of the Supreme

Court, done by prejudicing the public interests, by unduly restricting, or unduly obstructing trade? The question is one of undue restriction or obstruction of trade, and not of undue volume of trade. If mere size were the test of monopoly and trade restraint, we have not one, but a half dozen unlawful monopolies in the large department stores of a single city. If a manufacturing and selling business, fully equipped for its local market, extends its operations to cover a State, its business, its facilities, its capital, must grow larger. If it is to cover nations, it must be larger still. These plain facts simply buttress the holdings by courts that the normal and necessary expansion of business to any size is not forbidden by the Sherman Law, unless such expansion is accompanied or accomplished by an undue restraint or obstruction of trade. For, as said by Mr. Justice Day in *Flint* v. *Stone Tracy Co.*, 220 U. S. 166, 31 Sup. Ct. 342, 55 L. Ed. 389, Ann. Cas. 1912B, 1312:

> "The possession of large assets is a business advantage of great value; it may give credit which will result in more economical business method; it may give a standing which shall facilitate purchases; it may enable the corporation to enlarge the field of its activities and in many ways give it business standing and prestige."

Turning, then, to this foreign trade, we find that in 1901 the Steel Corporation did a foreign trade of $31,000,000, and in 1911 of $91,000,000. This (volume 10, p. 3847) was 90 per cent of the foreign iron and steel trade of the country. On the one hand, it is charged that this foreign trade was acquired by violation of the Sherman Act; on the other, that it is the normal and natural result of lawful business, commercial foresight, and persistent effort. To determine these contentions from the evidence, we now address ourselves. Of the purpose of this corporation to create and possess this foreign trade there can be no question. So that, if it was illegally done, the company can not escape the legal consequences. Its avowed purpose to enter into and acquire foreign trade in iron and steel is shown by the corporation's own proofs. Gary, volume 12, p. 4733; Reed, volume 14, pp. 5658, 5562, 5563; Bacon, volume 14, p. 5476. Indeed, in outlining the plan and scope of the operations of the Steel

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Company, whose formation he was then advocating, its first president (Schwab, volume 11, p. 4139) says:

"I enlarged and perhaps made a more strenuous talk to Mr. Morgan upon the subject of export, and our ability to export, and foreign business in foreign markets, than any other, excepting only the economic advantages to be derived."

Indeed, that the Steel Corporation was largely formed, that its large financial resources were designed, and the varied lines of its constituent manufacturing units were bought to enable it to successfully enter foreign trade, is shown by the proofs. Thus (volume 11, p. 4321), referring to his talk with Mr. Morgan, Mr. Schwab says:

"I expected, naturally, to increase the foreign trade very much. May I explain what I mean by my development of foreign trade? I said before that this business could only be practically and successfully developed by works having a complete line of steel products, and that was one of the things to be gained by this organization.

[105] "Q. And in taking this up with Mr. Morgan you presented that?—A. That was one of the things I urged."

The fact that the development of the foreign trade necessitated a wide diversity of products, that this product diversity was to be obtained by the Federal Steel Company acquiring a number of mills making such diversity of products and completely integrating itself, is shown by the proofs. Referring to carrying out the general plans which he and Mr. Morgan outlined for acquiring such properties, Judge Gary (volume 12, p. 4733) testified:

"Q. Now, what were the subjects considered by you gentlemen, directors of the Federal Company or owners of the Federal at that time, and on account of which, or after considering which, you reached the resolution you mention?—A. The question of securing the Carnegie properties, with their ore reserves, which contained a class and character of ore in large quantities which the Federal or the Minnesota Iron did not have, particularly their mills for diversified product, their location, and their organization, which was believed to be a very good one, and, if possible, the acquisition of other companies owning finishing mills, in order to diversify the product, including the Wire Company, which had been offered to us a number of times, and for the purpose, as I have said, of completing a rounded-out proposition for the development of the business, extension of the business, manufacturing at lowest cost, and, particularly, increasing the extent of export business."

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And that such foreign trade demanded such wide diversity of product as could only be supplied by a company which was broadly integrated to manufacture such diversified supplies is shown by the proofs. In that regard, a witness of long experience in foreign trade (Farrell, volume 10, p. 3790), says:

"Q. What is the nature of your customers in foreign countries? Do you sell merchants or directly to consumers, or both?—A. We sell to merchants, consumers, and manufacturers.

"Q. Is there any advantage in selling to merchants to have a diversified line of product?—A. A great advantage. That is the reason why we have been able to develop our business, because we could offer them a diversified line of products from one source.

"Q. From your knowledge of the business and of the way it is done, what would you say as to whether or not the different constituent members of the Steel Corporation could all together have developed such a foreign trade as has been developed by the corporation, if they had remained separate and distinct?—A. It would have been utterly impracticable or impossible. We had had an exemplification of that at the Pittsburgh Wire Company, where we were obliged to confine our exports to two or three different products, because of the necessity of having facilities to deal with certain lines of business. * * *

"Q. Take, for instance, the American Steel & Wire Company, as an economic proposition—as a business proposition; will you state whether or not it would have been feasible, or possible, for the American Steel & Wire Company to maintain agencies in the various countries as stated on Exhibit 39?—A. It would have been impossible owing to the cost.

"Q. What would be the fact as to the Carnegie Steel Company in all these countries?—A. The same thing would apply to the Carnegie Steel Company, even to a greater extent, because of the character of their product, which is not as widely consumed as wire products and sheet-steel products, and some of those others except in the case of some coarse products.

"Q. What influence, if any, does the offering of one class of steel products have on the sale of another?—[106] A. In the export markets, we say that one product sells another; that is, by having the great range of products, the buyer has an opportunity to order practically all of his requirements. Frequently these people will charter their own sailing vessels and load them themselves. They want to buy everything they can."

That this is a correct business estimate of the demands of the foreign market is corroborated by the testimony of the president of probably the most widely diversified range of

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finished steel products company in this country, who (Simmons, volume 23, p. 9403) says:

"Q. In what way has your ability to carry on a foreign business been affected by the fact that you have a full line consisting of many kinds of edge tools and cutlery?—A. Without that, we would have practically no business abroad.

"Q. Why is that?—A. Because no one line or one item in the line would be sufficient to interest the foreign buyers. It is the completeness of the line under one brand and one uniform quality that they seem to take an interest in.

"Q. That is, they buy full lines of you, do they?—A. Yes, sir."

Of the fact that this policy of foreign-trade expansion was as such entered into by the company and has since been pursued the proofs are full. Roberts, volume 13, p. 4969; vol. 11, pp. 4147, 4148. A most experienced man of one of its constituent companies, the American Steel & Wire Company, and who had developed its foreign wire business, was given absolute charge of the development, along the lines previously advocated (Schwab, volume 11, p. 4147; Farrell, volume 10, pp. 3774, 3775), of all the export business. In 1903 the Products Company, a subsidiary of the Federal Steel Company, was created for that express purpose. A systematic plan was pursued of establishing foreign distributing warehouses and of building up new freight lines and shipping facilities. It will thus appear that, whatever may be the legal consequences of the acquisition of this great volume of foreign trade, there can be no doubt of the fact that it was acquired by this company in pursuance of a well-understood purpose. The proofs also show that the diversified products of the Steel Corporation, the location of its plants for export manufacture, and its facilities generally, are the means by which this trade has been supplied and built up. And they also disclose the fact that the different subsidiary finishing companies of the Steel Corporation were, among other things, chosen and acquired by that company with a view to developing the very foreign trade which has since been acquired. Such being the case, it logically follows that if the possession of this great volume of foreign trade is illegal as a monopoly or restraint of trade, the Steel Corporation, of which the Products Company is the mere

agent, is also a violator of the Sherman law. Was, then, this foreign business acquired, on the one hand, through illegal methods by the Steel Corporation monopolizing or attempting to monopolize or to restrain foreign trade? Or was it, on the other hand, the result of lawful and fair means to expand and increase American foreign steel and iron trade without driving out those who were in such foreign steel trade, or without preventing those who wanted to enter it from doing so?

[107] We have already seen that when the Steel Corporation entered this field there practically was no existing foreign steel trade held by American steel manufacturers. We have seen the opposition existing in such foreign markets to the building up of such trade by a newcomer; we have seen that the markets of practically all the principal nations of Europe were tariff closed to American steel, and that the spasmodic dumping policy theretofore pursued by American steel manufacturers had created (volume 10, pp. 4126, 4127) a prejudice against American trade which had to be overcome. In that regard the proof by a witness of long practical experience, broad grasp, and commercial success in building up a discredited foreign steel trade gives weight to his evidence. It is (volume 10, p. 3842):

"It is impossible to develop a foreign business unless it is done continuously. Buyers will not patronize people who are not in a position to give them a continuous source of supply. We had, in the early stages of the corporation, to live down the dumping business, which was quite prevalent with some of the companies prior to the formation of the Steel Corporation. * * * Prior to the formation of the United States Steel Corporation some manufacturers in this country at times during depressions here would ship large quantities of materials to markets, principally to producing markets, such as Great Britain. The result was that prices were broken down, and in many instances the material was never delivered because the customers, after the prices had been disturbed, could buy material in their own country, and in some instances the customer has paid compensation to sellers to cancel the contract." [a]

[a] Indeed, the long time required to get foreign shipments of steel to their ultimate destination, and the changes in price meanwhile, makes even a regular, sustained foreign steel business (volume 10, p. 4126) a hazardous one.

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He further says, in substance:

Dumping is an uneconomic practice, and one that does not develop a continuous business. It was a sporadic business and was indulged in owing to the exigency of manufacturing at the time. The export business of the corporation has been prosecuted continuously. It has been built up from two hundred and ninety thousand tons in 1903, I think, to two million two hundred and forty-six thousand tons in 1912.

Speaking of the efforts of American steel manufacturers endeavoring from 1895 to 1901 to dump materials abroad, the same witness (volume 12, p. 4629) says:

"They were endeavoring to dispose of large quantities of material, and in doing so they dislocated those markets, and as a consequence of that the prices were greatly demoralized, and the manufacturers in those markets not only met the prices made by the Carnegie Steel Company, but made lower prices; and the result was that thousands of tons of material were not delivered by the Carnegie Steel Company, and it was an actual fact that the buyers of their products paid them a compensation to let them out of the contracts after the market had been demoralized. The records of our office in London show, and I have examined them myself at times when I have been over—I was interested in looking it up—show that over $100,000 was paid to the Carnegie Steel Company by buyers for canceling contracts after they had thrown this material on the market there to shipbuilders and all sorts of people."

It took the Steel Company (Schwab, volume 11, p. 4148) one or two years to get the foreign business started. It was necessary to establish and maintain a series of large warehouses all over the commercial world. Space forbids details, but the proof (Farrell, volume 10, p. [108] 3785; Defendant's Exhibit, vol. 2, pp. 179–189) shows that nearly 300 places of business have been established in 60 different countries and in all parts of the world, and that great warehouses or distributing stations have been opened at strategic distributing steamship centers. Taking Belgium, for example: It was a great manufacturing country; it had a tariff and 90 per cent of its manufactured product (volume 10, pp. 3786, 3849) was exported. Consequently, there was no market for the Steel Company there, except street car rails. But notwithstanding there was practically no Belgian market for foreign steel, the Steel Company located a large warehouse

at Antwerp in which it stored 10,000 tons of steel products, principally pipe. It was compelled to do this, because from Antwerp it was able to reach trading centers it could not reach direct from the United States. In that regard, the proof is (volume 10, p. 3786):

"We have shipping opportunities at Antwerp that do not exist in this country. Antwerp is a great distributing point; a large number of sailing vessels go to ports in the world that are not reached by steamers."

In the same way, while the Austrian tariff (volume 10, p. 3847) shut the Steel Corporation out of that country, it established a warehouse at Trieste, Austria, by reason of the fact that wire products and pipe can be trans-shipped at Trieste to ports on the Adriatic, Syria, and the Mediterranean. In the same way, the Steel Company established a warehouse depot at Vancouver, British Columbia, through which it furnished (volume 10, p. 3805), light rails for lumber camps, sheet iron, wire goods, and pipe. The building up of trade with British Columbia exemplifies that the steel trade acquired there was not by the Steel Company restraining or monopolizing an existing foreign trade, but was, by its creating a new and non-existent foreign trade, in the face of serious obstacles. To reach Vancouver, the Steel Corporation was confronted by a railroad freight rate from Pittsburgh to Vancouver of $18 per ton, while the English steel manufacturer could reach Vancouver on already established lines of steamers from Liverpool to Vancouver at $7 per ton (volume 10, p. 3805). When his steel reached Vancouver, the English manufacturer paid one-third less of the preferential Canadian tariff than the American manufacturer (volume 10, p. 3799). The result of these adverse conditions was that, after the Steel Company opened its warehouse at Vancouver, it found (volume 10, p. 3805) that it was impossible to do much business unless the Steel Company itself established a line of its own steamers from New York to Vancouver, through the Straits of Magellan. The Products Company itself, accordingly, started such a line, which is the only one from New York to Vancouver. It has four steamers of its own in service and two chartered ves-

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sels. These vessels call en route at many ports on the west coast of South America and Mexico, at some ports which have no regular steamship line. In addition to carrying the products of the Steel Corporation, they (volume 10, p. 3806) have "been carrying considerable quantities of material for other manufacturers in this country who had been unable to develop a business because of the lack of facilities." In order to obtain return freight for their steamers, the Products Company have |109| to load them at Vancouver with lumber or coal for the Gulf of California (volume 10, p. 3807) there they reload with copper matte for Dunkirk, France; and in France they take on chalk for New York. The whole triangular trip occupies from seven to eight months and shows the hitherto unused methods and the continuous sustained effort that must be made to get and hold foreign trade. By like effort trade suited to the varied needs of various countries has been built up. Thus (volume 10, p. 3787) distributing warehouses have been established at Johannesburg, South Africa, at Sydney, Australia, in New South Wales, Copenhagen, Denmark, Barcelona, Spain, Singapore, Straits Settlements, Valparaiso, Callao, Buenos Ayres, Rio Janerio, and other parts of the world to the number of 40. These warehouses (volume 10, p. 3787) are stocked with light rails for mines, corrugated iron for building, tin plate, wire products, pipe, and pretty nearly everything the Steel Company makes, except railroad rails. The steel for South America is carried by ship loads in chartered vessels; the Products Company having under charter, when this testimony was taken in 1913, some thirty-five vessels carrying cargoes to all parts of the world. Permanent and extensive bureaus are maintained at London and at Paris (volume 10, pp. 3789-3815), in order to sell from there to the English and French Colonial possessions, buyers for which possessions gather at the two cities named. The necessity for sustained continuous effort is shown by the proofs (volume 20, p. 7959). For example, the Products Company has a general steel trade in the Argentine Republic of six millions a year (volume 10, p. 3794) consisting of wire prod- [illegible] steel, tin plate, rails, structural material, street

railway material, etc. Taking the item of structural steel, the proofs show the continuous means by which such trade is obtained and held. The company located a resident engineering force there, designed and built in Buenos Ayres the first steel structural building in South America (volume 10, p. 3794), and, as a result of the maintenance of such a permanent engineering force there, has built every steel structure in Buenos Ayres, and (volume 10, p. 3795) "we have maintained a very large office there. We are building a number of government buildings there. We built all the buildings of the Buenos Ayres Exposition. We built one for the Argentine Government and one for the United States Government for their exhibits there." The proofs (volume 10, p. 3795) show that the products sold in the Argentine to make up this six million aggregate are produced by the following subsidiary companies of the Steel Company, namely, the Carnegie Steel Company, the American Sheet & Tin Plate Company, the American Steel & Wire Company, the National Tube Company, and the Lorain Steel Company, and (volume 10, p. 3801) the American Bridge Company. It will be noted that these products, with the exception of the Lorain Steel Company, practically come from the Pittsburgh district, and thus substantiate the proof (volume 10, p. 3829) that the Federal Steel Company was driven to further expansion and integration in order to enter foreign trade.

[110] A similar trade of diversified articles amounting to four millions (volume 10, p. 3802) has been built up through agencies in four principal commercial centers in China, and a trade (volume 10, p. 3812) of five millions in Cuba. As evidencing that the foreign trade was largely newly created instead of taken from others, reference may be made (volume 10, p. 3811) to the trade built up in Black Sea territory. The steel sheets, pipe, and wire products from the American Sheet & Tin Plate, the American Steel & Wire, and the National Tube Companies were at first sent to Hamburg and there trans-shipped. The building up of that trade by the Steel Company has caused (volume 11, p. 3811) the establishment of a direct line sailing every six weeks from

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New York to the Mediterranean, for which the Products Company furnished the nucleus of each cargo, viz., from 3,000 to 5,000 tons, but which afford shipping facilities to American manufacturers of all kinds of products. In the same way, a sustained trade of six millions a year (volume 10, p. 3818) has been developed in Japan. This trade consists in pipe, railway material, structural bridge steel, light-gauged steel, tin plate, and street-railway material, in all (volume 10, p. 3819) to the extent of 25,000 tons per month. In addition to using the regular steamer line, three or four vessels chartered by the Steel Corporation carried out entire cargoes each month from New York to Japan of the varied products (page 3818) of the Carnegie Steel Company, American Steel & Wire, American Bridge, American Sheet & Tin Plate, National Tube, and Lorain Steel Companies, respectively.

We have cited the above comparatively few foregoing proofs as to illustrate the Steel Company's foreign trade to exemplify its own continuous and indefatigable efforts (volume 10, pp. 3844–3846), to build up this trade on legitimate, commercial lines, and not by trade restraint or monopoly at the expense of its competitors. It has been the creation of a new American foreign trade, and not the monopolistic seizure of a pre-existing American foreign trade. Space constrains us to go into the extent of territory and varying character of that trade, the varied and individual requirements that had to be met in different markets, all of which show conclusively that the dumping, spasmodic foreign-trade practices in vogue in the steel trade at the close of the last century were at variance with the building up of dependable foreign trade, and that with the Steel Corporation has come the substitution of reasonable, sound, and successful commercial practices in which and by which, under the proofs in this record, a dependable foreign steel trade can alone be built up. All these proofs, facts, and results serve to justify our conclusions, which we find as a fact, that this foreign trade of the Steel Corporation has not been gained by monopoly and is not a monopoly; that it does not, and has not, restrained trade; but, on the contrary, others in the steel trade (Youngstown, vol-

ume 19, p. 7708; Maryland, volume 20, p. 7979) have been, at the same time, free to enter such foreign trade and have done so to the extent of their resources. From a business view-point, the matter is well summed up by an experienced business man, produced by the Government, who, speaking of the wire and [111] nail business with which he was familiar, and of the export business of the Steel Company, says (volume 5, p. 2033):

"I would say that it is the magnificent organization of the export department of the Steel Corporation which accounts for their success to a large extent. In every country in the world they meet the conditions; for instance, they have to have different gauges in different countries and different size kegs. In Japan there is a unit there which is different from elsewhere. Ours is a keg of 100 pounds, but theirs is a keg of 133 pounds. Now, to know how to reach all the different countries and supply the needs according to the circumstances and give them prices, and so on, in their own money, or it may be in English money, it is their wonderful organization that enables them to reach out as they do.

"Q. So the organization of the United States Steel Products Company, which handles the foreign business, is a very valuable thing for the steel trade of this country, is it not?—A. Absolutely so. It is a wonderful organization."

Bearing on the systematic organization thus referred to, the proof (volume 10, p. 3788) is, in substance, as follows:

"The managers of these large offices in foreign countries are almost entirely American, and nearly all of them have been trained in our offices here. We have a civil-service system in our business, and our men are promoted from one office to another according to their aptitude for business in certain countries. One man might be a good business man in Brazil, and might be a total failure in Australia."

As showing that this foreign trade has been built up on business executive effort, we may here refer to the facts later noted, namely, the very material decrease in the cost of selling and the very material increase in the prices obtained. And in that connection, namely, the increase in price obtained for goods sold abroad, and the decrease of price for goods sold in the United States, the proof (defendant's exhibit, vol. 2, p. 190) shows the important fact, namely, that this foreign trade has not been built up at the expense of the home market. Without entering into the details of that exhibit, it suffices to say that some 80 steel or wire products

are there listed, all of which have been sold at materially higher prices in the foreign than the same articles were being sold for in the home market. We find in that list such important and widely used articles as tin plate, structural steel, blooms, billets, and slabs, axles and steel wheels, plates, bars, and hoops, T-rails, pig iron, black and galvanized pipe, seamless tubes, horseshoes, wires of all kinds, nails and spikes, fences, bale ties—for all of which higher prices were charged and obtained in the foreign market than those paid by the domestic consumer. In connection with that exhibit, we note the testimony of W. E. Corey (volume 8, p. 3042), who says that, during the time he was president of the corporation:

"The Products Company had become so well established and had worked up such a line of customers, and trade conditions in the world were such, that as high prices were netted to the mills on foreign business as on domestic, and on some occasions were higher on certain contracts."

To the same effect is the testimony of James A. Farrell (volume 10, p. 3853), who says:

"Q. According to this statement, Exhibit No. 48, the gross tonnage of the corporation increased between those years from 1,001,716 to 2,243,188 tons, that is, from 1904 to 1912, or 128.9 per cent?—[112] A. Yes, sir.

"Q. While the selling value increased 181.7 per cent?—A. Yes, sir; 181.7.

"Q. Or an increase of the average per gross ton of 25.8 per cent?—A. Yes.

"Q. What occasioned that increase in the average price per ton received by you on these export sales?—A. Because of the fact that we were constantly selling a higher-priced product; that is, we were selling the various commodities in highly finished lines and fewer of the products in semi-finished and coarser lines.

"Q. How was it that you were able to increase the value or improve the kind of product you were selling in that way? Was it because you were becoming established, or why?—A. It was a natural development due to the fact that we had established offices all over the world, and because of the fact that our mills were getting into a state of preparation to do this diversified business.

"Q. In addition to selling the higher grade of goods, more finished articles, how do the prices upon these specific commodities compare per ton in 1904 and 1912, as a rule?—A. They show an increase of about 25 per cent.

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"Q. Then your increase was caused by that also, that you were able to get better prices on a specific product?—A. Yes, sir.

"Q. Or many of the specific products?—A. Yes.

"Q. That is all detailed, is it not, in defendant's Exhibit 42?—A. It is.

"Q. Year by year?—A. Yes; 1904 to 1912.

"Q. Inclusive?—A. Yes.

"Q. This Exhibit 43 shows an increase in the domestic business in tonnage from 1904 to 1912 of 87 per cent, or from 5,818,149 tons to 10,877,544 tons, and an increase in the selling value of 65.2 per cent, or a decrease in the average per gross ton on shipments to the domestic market of 11.6 per cent?—A. 11.6 per cent.

"Q. What was the occasion of that?—A. Because of the fact that prices in the domestic department have constantly shown a decline. We were getting about $8 a ton less for materials in the domestic market than we were receiving in 1904.

"Q. You have stated that you are getting about $8 per ton less in the domestic market than you did in 1904, that is, you did in 1911?—A. Yes.

"Q. Has the price in the domestic market fluctuated in that time more or less in different years?—A. More or less, but it has gradually shown a lower return."

In this matter we have not overlooked Government Exhibit No. 205 (volume 4, p. 1614), which challenges some 11 articles of export. It will be observed, however, the exhibit itself concedes that the prices include "in the majority of cases the freight and insurance to destination." As we have no facts and figures as to the separate items of such "C. I. F." exports, we have no proof warranting our excepting them from the conclusions stated above, namely, that higher prices have usually been obtained in the foreign market than have been charged in the domestic.

It will thus be seen that the significant factor in the view of the experienced witness quoted above (volume 5, p. 2033) is in the Products Company ascertaining, meeting, and supplying the individual need of individual foreign markets. And, as emphasizing his illustration of a [113] different nail-keg unit in Japan as the basis of doing business, it might be added that to gain a foothold in the trade of India another unit was demanded, for the proofs show (volume 10, p. 3792) that in India the keg unit does not prevail at all; that there the nail unit is a seven-pound package of nails in paper packages, which are put up in such package

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at the nail mill at Allentown, Pa., a seaboard plant, which was acquired with the American Steel & Wire Company. In the same way the proofs show (volume 10, p. 3792) the markets of Australia demand an oval nail, while in Java a round one is required. Indeed, the absolute necessity of making different goods for the foreign markets from those made for home trade is illustrated by the proofs of the large expense necessarily incurred to meet these local foreign requirements. Thus the evidence (volume 10, p. 3881) is:

"The first rail order we executed at the Tennessee Works was for the Argentine Government, for the Chumbicha Railway. We expended on the rolls in preparing the rails for that order something like $74,000. That was the first order."

And (volume 10, p. 3844):

"After the corporation acquired the American Steel & Wire Company they expended $800,000 on the Allentown mill in order to diversify its products and increase its opportunity to do a wider range of foreign business than it was doing at the time."

A patient study of the proofs of actual business facts, difficulties, and efforts shown in the testimony of experienced business men leads us to these conclusions:

First, that the foreign business in steel and iron done by the Steel Corporation has increased (volume 10, p. 3843) from 290,000 tons in 1903 to about 2,260,000 tons in 1912, and in value from $31,000,000 in 1904 to $91,000,000 in 1913 (volume 10, p. 3783).

Second, that the Steel Corporation normally does from 80 to 90 per cent of the foreign iron and steel business of the United States (volume 10, p. 3897); that its exports of $91,000,000 in 1913 includes $30,000,000 of "re-export" business, so called, which it does in connection with other American manufacturers using its basic products; that the "re-export" business in connection with other companies (volume 10, p. 3848) gave employment to from 15,000 to 18,000 men, and the foreign business of the Steel Corporation to 40,000 men.

Third, that its competitors in the iron and steel business, with some few exceptions (volume 19, p. 7709), do not seek

to enter the foreign market so long as they can get a market at home (volume 10, pp. 3845, 3847, 3697; volume 20, p. 7980; volume 28, p. 12039), and what foreign steel business there was prior to 1901 had been small, and generally not profitable, and was done at from 7 per cent to 11 per cent expense on invoice (Farrell, volume 10, p. 3791; Government Exhibits, volume 3, p. 1133; Painter, volume 5, p. 1974; Stevenson, volume 3, p. 1093; Benner, volume 6, p. 2499, in connection with Farrell, volume 12, p. 4628; Gary, volume 12, p. 4758; Defendant's Exhibit, volume 9, p. 731).

Fourth, that the success of the Steel Company in building up this continuous foreign trade primarily consisted in its mechanical ability [114] to make the wide range and variety of product required by foreign markets and in its manufacture of such diversified products at plants properly located for export trade. Volume 10, pp. 3790, 3843, 3844, 4128; volume 11, p. 4320; volume 13, p. 5017; volume 23, p. 9403; volume 20, pp. 7978, 7979. In that connection reference might be made to the proof (volume 10, p. 4128), as showing how essential to the maintenance of foreign trade is the diversity of product which comes from broad integration (volume 10, p. 4128):

> "Q. Can a manufacturer having a large line of products for sale afford to maintain such warehouses and conduct that business, when a person manufacturing only one line of goods could not afford to do it?—A. It was tried by the National Tube Company before the formation of the Steel Corporation. They established a large warehouse at Johannesburg, South Africa, and were obliged to abandon it for two reasons, one because of the cost of doing business. It cost them over 8 per cent to do the business, because they had one line of goods to sell only."

Fifth, in gradually reducing its own overhead cost of foreign selling (volume 10, p. 3791), from about 3½ per cent in 1901 to 8 per cent in 1911.

Sixth, in gradually increasing the price of such of its product as was sold in the foreign market from 1904, when the trade had gotten under way, to 1912, while it was at the same time gradually decreasing the price of such of its product as was sold to consumers in the home market. Volume 10, pp. 3853–3855. These relative changes are shown by defendant's Exhibit (volume 2, p. 203), as follows: In 1904 the Steel

Corporation sold such of its product as it exported at an average price of $27.22 per gross ton; by 1912 it was able to market them at $34.24. During the same period it was in 1904 receiving for such of its product as was sold in the home market an average of $41.44 per gross ton; by 1912 this price was reduced to $36.53.

With these facts, figures, and results proved in this record, we are warranted in holding that the foreign trade of the Steel Corporation, its mode of building it up, and its retention when built up are not contrary to the Sherman Law. To hold otherwise would be, practically and commercially, to enjoin the steel trade of the United States from using the business methods which are necessary in order to build up and maintain a dependable business abroad, and if the Sherman Law were so construed, it would itself be a restraint of trade and unduly prejudice the public by restraining foreign trade. Happily, it is open to no such charge, for, as the Supreme Court in the Standard Oil case said:

> "One of the fundamental purposes of the statute is to protect, not to destroy, rights of property."

[4] Seeing, then, that the Steel Corporation, at the time this petition was filed, was engaged in the natural and normal conduct of business, both home and foreign, and that it was not then monopolizing, restraining, or attempting to monopolize or restrain, trade in iron and steel between the States or with foreign nations, we next turn to 1901, the year the corporation was formed, and address ourselves to the inquiry whether it was formed in order to so monopolize or restrain trade; or, to use the test fixed by the Supreme Court (*Nash* v. *United States*, *supra*), [115] was the Steel Company, when created, a combination which by its intent was meant to, or by the inherent nature of its contemplated acts would, "prejudice the public interests by unduly restricting competition or unduly restraining the course of trade"? Now, what is meant by the phrase "the inherent nature of its contemplated acts," which violate the statute when an illegal combination is originally formed, and which, continuing, because inherent elements warrant its dissolution whenever questioned, is illustrated by what was found to be

the fact in the Standard Oil case. There the court based its right and duty to dissolve the Standard Oil Company on the two facts that, first, the Standard Oil Company (221 U. S. 74, 31 Sup. Ct. 502, 55 L. Ed. 619, 34 L. R. A [N. S.] 834, Ann. Cas. 1912D, 734) destroyed the "*potentiality of competition*"; and, second, that it was "a monopolization *bringing about a perennial violation* of the second section of the act." And that there was in the Standard Oil Company of New Jersey a destruction of the power to compete—the potentiality of competition—and a perennial, continuous, and perpetual violation of the law was shown, in the court's estimate (221 U. S. 75, 31 Sup. Ct. 505, 55 L. Ed. 619, 34 L. R. A. [N. S.] 834, Ann. Cas. 1912D, 734), by the following state of facts:

"(*a*) Because the unification of power and control over petroleum and its products which was the inevitable result of the combining in the New Jersey corporation by the increase of its stock and the transfer to it of the stocks of so many other corporations, aggregating so vast a capital, gives rise, in and of itself, in the absence of countervailing circumstances, to say the least, to the prima facie presumption of intent and purpose to maintain the dominancy over the oil industry, not as a result of normal methods of industrial development, but by new means of combination which were resorted to in order that greater power might be added than would otherwise have arisen had normal methods been followed, the whole with the purpose of excluding others from the trade, and thus centralizing in the combination a perpetual control of the movements of petroleum and its products in the channels of interstate commerce."

At this point we deem it proper to specially note these vitally important terms used by the Supreme Court, viz, the destruction of "the potentiality of competition," and the "perennial violation" of the statute. For, when it comes to the question of the dissolution of the combination, and that is the phase of this case we are now considering, a dissolution must be decreed whenever the inherent nature of its contemplated acts is such that from its very nature the combination was bound to destroy "the potentiality of competition," and these violations were, from its inherent nature, bound to be perennial. In other words, the Standard Oil Company had to be dissolved because its inherent nature was such that it was bound to destroy the power to compete in petroleum, and it would not be heard to say it had no intent to destroy

competition when its inherent nature had made it do so. It therefore follows that, if such destruction of the power of competition and that by perennial violation thus evidenced the original inherent illegal nature of the combination, it would seem that if a long series of years had not resulted in a combination either destroying actual competition of others, or of their power to compete, or had not resulted in the long years of the combination's business in constant, perennial violations of law, it could not [116] reasonably be held that the inherent original nature of such combination was such as to make it unlawful when originally created and liable to dissolution whenever afterwards challenged. On the contrary, it would seem that the acts of a combination are fair tests of the real inherent nature of the combination, and that in such case the time-tried rule, "By their fruits ye shall know them," might well serve to best gauge the source or tree from or on which the fruit matured. But, passing by this time-tried rule, with its practical tests of what the Steel Company did in the ten years subsequent to its creation, let us address ourselves to the proofs of what was done at or about the time the Steel Corporation was formed, and from these proofs alone determine whether the object of those forming it was to prejudice the public by unduly restricting competition or unduly obstructing the course of trade, or, even if there was no such intent, was the inherent nature of the Steel Corporation's contemplated acts such as to prejudice the public by unduly restricting competition or unduly obstructing the course of trade?

A study of these proofs satisfies us that the United States Steel Corporation could not have been formed unless the minds of two men had previously united in a common purpose. Those two men were J. Pierpont Morgan and Andrew Carnegie. With them coöperated Charles M. Schwab, the President of the Carnegie Steel Company, Elbert H. Gary, president of the Federal Steel Company, and James H. Reed, the counsel of Mr. Carnegie and a director of the Carnegie Steel Company, all of whom, except Mr. Carnegie, became directors of the Steel Corporation. While the coöperation and participation of other persons and other companies subsequently aided and was necessary to the carry-

ing out of the proposed formation of the Steel Company, yet, laying aside all mere incident, and going to the crux of the case, it is clear from the proofs that the Carnegie Steel Company held such a dominant relation to the steel and iron trade, and Mr. Morgan held such a dominant relation in finance, that unless Mr. Carnegie, who was the controlling shareholder of the Carnegie Steel Company, and Mr. Morgan, through his relation to the finances of the country and as a director of the Federal Company, could make possible a purchase of the Carnegie Company by the Federal Company, the United States Steel Corporation could not, and would not, have been formed. As Messrs. Schwab, Gary, and Reed all aided in bringing the two principals to an agreement, and as a result of such agreement was the formation of the Steel Company, we are justified in saying that, if there was intent to violate the Sherman Law, to be effected through the organization of the Steel Company, then such company was primarily the work of Messrs. Carnegie and Morgan, assisted, of course, by all those who participated in the furtherance of this primary purpose of bringing the principals together, as directors of the Federal Steel Company in agreeing to a purchase of, or in forming and taking part in, the management of the Steel Corporation itself.

Considering the magnitude of what was done, the mere sequence of events which resulted in the formation of the Steel Company had a directness, a simplicity, and a rapidity which is remarkable. On De[117]cember 12, 1900, Charles M. Schwab made an address at a dinner given to him in New York in which, in substance, he gave a clear statement of the steel business, showing that the metallurgical method of making steel and the physical method of handling it were then fully developed, and he outlined his notions of wherein further advance was possible. His testimony as to his address is:

"I talked about the advantages that might be derived from doing a manufacturing business on a larger scale than had then been attempted and that we had undertaken in the manufacturing lines up to that time; all our endeavors up to that time had been to perfect methods of manufacture. By that I mean metallurgical and eco-

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nomical methods. By economies I mean that I believed that we had then reached the limit, or very nearly so, at which economies from a metallurgical or mechanical standpoint could be made effective, and I believed that the next great step in economical manufacture was to so regulate the business and plants of the business in manufacturing on a larger scale than had ever been attempted heretofore; that instead, as was then the practice, of having one mill to make 10 or 20 or 50 products, the greatest economy would result from having one mill make one product, and make that product continuously. The history of manufacture has shown that any line that specializes in any direction obtains the best economical results, and I believed that the various lines of steel should be so specialized, that it was not possible for any one company then to do that at once, but I also believed that great economies would result from locating mills at the point of consumption, by which the cost of transporting the finished material to the point of consumption would in many cases be reduced or saved. I also pointed out that I believed that great economic results would follow from our being able to manage these concerns in a manner that would stimulate the most effective effort in the management of the different concerns.

* * * * * * *

"I went on to say that one of the most effective things would be our ability, as I said before, to stimulate the various managements. Secondly, or thirdly, I felt that the great export business of this country in iron and steel could only be done in that way. I felt, furthermore, that great economies would result in all these general items of expense which are met in the manufacture of iron and steel, on account of selling, traveling, office expenses, and all the general items that each individual concern with an individual line had to cover with a full organization. That could be covered by one such organization, and I felt that much economy would result in that direction, and, indeed, the whole line of my talk that evening was intended to show that the next great economic step to be made in the manufacture of steel, or, indeed, any business in general—I did not confine myself entirely to the steel business—directly to the steel business, but, in general, that the great economic result to be next obtained in manufacture was by the adoption of these methods, and then I made that application generally to the steel industry. * * * I pointed out, for example, the attempt that had been made to manufacture steel cars; that few companies throughout the United States who were engaged in the manufacture of bridges and other fabricated materials were attempting to manufacture steel cars; that that could never be successful; that the only way it could be successful was for some one works to devote itself exclusively to the manufacture of steel cars, and one kind of steel cars; that if different kinds of steel cars had to be made, like passenger cars, for example, as being different from freight cars, two separate works, as following out this

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general line of policy, would have to be built and so operated. I then pointed out, for example, structural steels. In those days a structural mill would probably make six different sizes of beams and channels and angles; by my plan a mill would be built that would roll on angles exclusively, and a mill would then be built that would roll on beams exclusively, and that the finished material, and so forth, of these mills, being adapted for that special thing, would be better and cheaper.

* * * * * * *

[118] "Well, Mr. Morgan listened with interest, and then asked me to sit down and talk with him a few minutes. The dinner was short and we sat in a corner and talked for some time at more length and with more amplification upon this subject."

Shortly afterwards Mr. Morgan sent for Schwab, who

"This whole subject was then gone into with much more detail, and the theories which I then advocated were amplified with reference to their application to the steel industry; and I pointed out at that interview to Mr. Morgan in great detail the economies and advantages that would result under those theories from their application to the steel industry.

"Q. Was there any suggestion then, or discussion, with regard to the advisability of a large corporation with facilities for manufacturing on all lines?—A. There was; that was the chief discussion of the evening.

"Q. Can you go into that a little fuller?

* * * * * * *

"I told Mr. Morgan that if the steel industry of this country were to start anew, that if there were no steel plants here, what I should advocate and build was such a plant as I have described heretofore, but that in view of the fact that the most of these things did exist, perhaps not in an ideal way or ideal location, that a new plant would be made possible, and that in view of the fact that they did exist, and that they could be made ultimately to conform to this theory, I believed that the then existing steel plants which I pointed out to him could be formed into one company, which would ultimately accomplish all the results which I had outlined. That was discussed at some length. The companies were mentioned that I thought would accomplish these results. They did not, by any means, embrace all the companies in the United States, but those which I thought would effectively make such an organization as was outlined.

"Q. Were they such as to cover all the branches of the industry?—A. They were.

"Q. And what was your discussion with him with regard to the foreign situation?

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"With reference to the foreign situation, I pointed out to him that up to that time our business, the steel business in general, had been nominal with reference to export business; and that, in my opinion, it could only be made profitable and possible by such an organization; that no company selling an individual line, a single line, or one or two lines, could hope to successfully compete for foreign business where they were not prepared to furnish the customer every line that he might require for a structure or a business; and that half a dozen or a dozen individual companies could not afford the expense or the organization or secure the talent necessary to make a successful export business, while such a company as I outlined could.

* * * * * * *

"Q. Did you mention the facilities that such a corporation as you described would need to possess?—A. I did; and I may say that I enlarged and perhaps made a more strenuous talk to Mr. Morgan upon the subject of export and our ability to export and foreign business in foreign markets than any other, excepting only the economic advantages to be derived.

* * * * * * *

"With reference to the ore, I pointed out to Mr. Morgan how advantageous it would be, for example, for one mine to mine all it could, regardless of what furnaces or products it was to go to, and have that ore then distributed by an expert between these 100 furnaces that would then operate, instead of 5 or 6 by which the mine could run continuously and run at a given amount and under the most economical conditions, regardless of how the ore was to be distributed; because, when a firm owned 5 or 6 furnaces, it was a question of how much of each kind of ore from each mine they could use, but, when a firm owned 100 furnaces, the question of distributing the ore from [119] each individual mine to that furnace became a simple and effective one; and that that would be of great advantage from a mining point of view. The fact that one mine contained ore of a high percentage of phosphorus might make it possible in an individual concern to only run it half the year; while, if the product from that mine was to be distributed to 100 furnaces, the additional amount of high phosphorus would be so little as to be no disadvantage, and therefore that mine could run continuously. With reference to the handling of the ore from the mines to the docks in the days of individual ownership, it was exceedingly difficult at the docks and on the railroad to keep the ores for the different firms and from the different mines separated and shipped as they desired to handle it upon their boat; whereas, with this large ownership of works, it was possible to ship the ore to the various docks as fast as it came down, without any of the expense from delay. The ships, instead of waiting at the docks until their special load of ore could come around and take the ore, they would come into port and depart ten hours later, instead of three or four days later, because the ore was always there ready to load on

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the ships. There is nothing in shipping that costs more than delay in discharge and loading; and therefore that very great economy was accomplished at once. I think the records of the ships will show to-day that a very small fraction of the time was consumed in handling the materials at terminals, as compared with what it was in times of individual ownership. So I went through from ore mines, railroads, and shipping, to the handling of material, right down to the finished material, which was the same thing as I have described before with reference to individual efforts.

"Q. Did you or not speak of the advantage of a company owning its ore and its furnaces, and its rolling mills and finishing mills?

* * * * * * *

"I told him—I will put it that way—that up to 1892 there was a very strong feeling that manufacturing companies should not own ore, but that had then changed. The Carnegie Company was gradually acquiring ore wherever it could, and, to my mind, the successful manufacture was only possible where every single step in the line of manufacture was carried out by some one concern, and that for the greatest economy, for the greatest development of the business, it was an absolute necessity."

The possibility and desirability of creating an American company capable of acquiring foreign trade should have been especially dwelt upon by one so thoroughly conversant with the steel business will be quite apparent when the significance of the proofs as to the relative relation of the export trade of the great commercial European countries is considered. The export steel trade of England is (volume 10, p. 3898) 65 per cent, as contrasted with 35 per cent of home trade; Germany (volume 10, p. 3898) sends 60 per cent of her steel abroad, as against 40 per cent consumed at home; Belgium (volume 10, p. 3849) sends 90 per cent of her product abroad.

The outcome of this second talk was that:

"Mr. Morgan was very much interested, and said to me that if I could secure a price from Mr. Carnegie that he would undertake the formation of such a company; that he would undertake the business; that is the way he said it." Volume 11, p. 4141.

Within two or three days Mr. Schwab saw Mr. Carnegie, and, while the latter declined to give any written option, he expressed himself as willing to sell. Certain figures then jotted down by Mr. Schwab or Mr. Carnegie were carried by the former to Mr. Morgan, and were the basis on which

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Mr. Morgan proceeded in the formation of the Steel Company, although he had then no written agreement from Mr. Carnegie whatever. These facts are shown also by others. Volume 12, p. [120] 4727. This situation continued until February 26, 1901, when Mr. Morgan obtained a formal letter from Mr. Carnegie through Judge James H. Reed. The latter's testimony (volume 14, p. 5660) is:

"He [Mr. Morgan] told us, in substance, that he had just awakened to the fact that he was making contracts here with stockholders of the Federal, the National, the National Tube, and so on, and he had not a scratch of the pen from Mr. Carnegie under which he could hold him or hold his estate if he died. He said, 'You men go up the street as fast as you can and get me something.' We took the Elevated and went up to Mr. Carnegie's house and explained what we were there for. * * * Mr. Stetson and I then, with occasional interruptions from Mr. Carnegie, dictated a letter to Mr. Morgan, or to J. P. Morgan & Co., which Mr. Carnegie signed, and we took the original down with us to Mr. Morgan, and he seemed quite relieved. * * * I don't think we left any (copy) with Mr. Carnegie."

By such letter (Exhibit 80, volume 3, p. 325, defendant's exhibit) Mr. Carnegie agreed to sell his mortgage bonds and stock in the Carnegie Steel Company and agreed to receive in lieu thereof mortgage bonds of the United States Steel Company. The letter also provided that his sale was conditional on the Steel Company taking the holdings of the other shareholders in the Carnegie Steel Company at the same rate; but, instead of paying them in bonds, as he was, they were to be paid in stock of the new company. The testimony (volume 14, p. 5656) shows that Mr. Carnegie was anxious to sell and retire from business. Indeed, several efforts had previously (volume 14, pp. 5474, 5475, 5513; volume 11, p. 4132; volume 12, pp. 4722, 4723, 4725) been made to sell the Carnegie Company. On the consummation of the sale, Mr. Carnegie took no stock in the new company and had no part in its management. While, of course, he knew what companies the Steel Company was absorbing and was keenly alive as to what properties his purchase-money bonds would cover, and, indeed, in respect to one company, the National Steel Company, which occupied a midway position between Chicago and Pittsburgh, insisted (volume 12,

p. 4747) that it had to be taken in and his bonds cover their property, there is no proof whatever that he occupied any other relation than that of a seller of his stocks and bonds in his own company. Indeed, the dealings between the two men, the fact that they did not meet each other, their not even talking to each other about the plans, scope, and future of the new company, their allowing the intended sale to stand without any written evidence that it had been made, the inability or difficulty either of them would have had in its being carried out if either had died, conclusively show that the whole transaction between the two was that of a sale of Mr. Carnegie's personal holdings effected between them through the medium of third persons. We are therefore warranted in finding, as we do, that there is no evidence whatever to show that Mr. Carnegie united with any one to join in any violation of the Sherman Act, and that the statement in his answer filed in this case, to wit, "that his sole motive in agreeing to the sale of the property of the Carnegie Company to the United States Steel Corporation was his desire to retire from the hazard and responsibilities of active business, and that since said sale was concluded he has had no connection with the business of the purchasing corporation," is true, and a conclusion which is supported by the evidence hereafter quoted at [121] length showing the reason which led Mr. Carnegie into being willing to sell.

We turn next to Mr. Morgan and such other persons as coöperated with him in forming the Steel Corporation and see what the proofs show. The vast size of the Steel Corporation they formed, the influence and control incident to such size, its seeming power to crush competition, its ability to absorb business through its systematized organization are all factors so associated with monoply to restrain trade and crush out competition that we may say that, standing alone as a mere isolated fact, this great company gives one such an impression of monoply that we feel we may in this inquiry place the burden upon it and its formers to satisfy us by affirmative proof that monopoly was not the purpose for which it was formed, but that it was the normal, regular, and natural outcome of the improvement in steel making,

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and its concentrated powers were only such as were deemed to be necessary to successful producing and marketing its product. To such inquiry and the proofs bearing thereon we now address ourselves.

The iron and steel trade of the United States has been a gradual sustained evolution. So far as the metallic base is concerned, such evolution may be broadly stated to have been from iron to steel, from steel to Bessemer steel, from Bessemer to open hearth. It is interesting to note that the next development (volume 10, p. 4068; volume 26, p. 11066) bids fair to be from fuel smelting to electric smelting. These several stages of development have been accompanied by an abandonment and loss of equipment of great value (volume 2, p. 1167; volume 2, p. 732; volume 10, p. 3859; volume 10, p. 4077; volume 13, p. 4963), and have necessitated vast further expenditures for new appliances to make the new open-hearth steel product. To illustrate, referring to a single one of the rapid revolutions in steel making—the removal of phosphorus in pig iron in the Bessemer or open-hearth processes by the substitution in the lining of lime for a silicon base—this single chemical fact, made public in 1885 (volume 13, p. 4940), "practically revolutionized the iron industry, and by the year 1890 basic open-hearth steel had practically supplanted the use of wrought iron for all commercial purposes." Side by side with these rapid metallurgical changes of product there was at the same time going on radical changes in the mechanical handling of the product. To refer to but one of the many mechanical changes, "in the late 80's [volume 13, p. 4940] the introduction of electricity as a motive power also produced another revolution in the steel industry, so that practically all works had to be rebuilt if they desired to keep abreast of the recent developments of the art." But not only were metallurgical and mechanical changes taking place with regard to the different stages of metal production, but there developed at the same time a radical change, not of one product or one stage, but of all stages, in the way of rounding up plants, or, as it is called, integration, so that continuous processes could be carried on. In the old method

of wrought-iron making there was no continuity of operation. Volume 12, p. 4934. The molten metal produced by a blast furnace was run into pig iron. This pig iron was transported to a rolling mill, where it was first puddled and [122] then rolled into muck bar, which was again suffered to cool. The muck bar was again heated and rolled in finishing mills. As steel making progressed, its manufacture by various agencies (volume 13, p. 4944) not necessary here to detail, became a continuous-fluid process. Instead of the metal being suffered to cool, it was continuously treated first as a fluid and then as an ingot, but always without entirely losing its initial heat. But these steel plants, with their continuous processes and their increased capacity to produce, serve to confront the finishing plants with grave problems in reference to their basic supplies. This era of change and its new problems is testified to by Percival Roberts, jr., whose experience and relation to the steel business give weight to his summary of the changing conditions and problems confronting that industry. He testified (volume 13, p. 4944):

"I think I had reached the situation existing as of the late 80's when basic open-hearth steel was gradually, or rapidly, I might say, supplanting wrought iron. The wrought iron plants that were of smaller capacity and had insufficient capital or lack of sufficient tonnage to dispose of the product of an economical steel plant commenced purchasing billets and blooms from those who had converted their plants into steel-manufacturing ones. This production of billets and blooms was practically a by-product with the finishing mills. In times of activity they had very little surplus product to spare. When not so pushed on finished material, they disposed of part of their steel-melting capacity in the shape of semi-finished material. The iron plants purchasing this material found that the same could not be carried on successfully, due to the fact that it required an almost unlimited capital to be locked up in supplies of billets, as finished material required so many different weights of billets and blooms that the stock on hand had to be enormously large; also the chemical requirements of orders requires that different grades of steel should be used. This also required a vast amount of material to be carried at all times on hand. Another matter which occurred about that time changed very materially the situation, and that was the introduction of what was known as the Jones mixer. I might say that up to that time the production of all blast furnaces was run out from the furnace in the shape of liquid pig iron, and cast in the

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sand and allowed to become cool. The invention of the Jones mixer was for the purpose of carrying on the production of steel as one continuous operation from ore to the finished product, never permitting the material to become cold until it reached the final economic shape. I do not mean to say that this applies to all finished shapes, but to a cross-section of material at which it would be economical to let the material cool.

* * * * * * *

"The Jones mixer is a large vessel placed between the blast furnace and the steel works in which the product of the blast furnace is run in liquid form, making a large reservoir of fluid pig iron from which ladles are taken in liquid condition—the contents in liquid condition—and used in Bessemer converters or open-hearth furnaces. The advantage of this process was that it reduced the cost of manufacture in this one respect alone by about $1 a ton, which is the cost of remelting cold pig iron for steel production.

"The situation from 1890 on grew more and more acute. Those concerns which had become more or less integrated and had changed their methods from those of iron to steel were continuing their integration to even a greater extent than before, although I would like to say that even prior to the introduction of steel the matter of integration was one of varying degree, even in the manufacture of wrought iron, although there was not the same necessity for it. In those days one man mined ore; another man ran a blast furnace; another man operated rolling mills. The processes were all disconnected.

* * * * * * *

"Coal and limestone were sometimes separate, sometimes controlled by one party, but even in those days there were certain establishments which controlled their material from the ore and limestone up to the finished wrought [123] iron product, so that even in those days iron manufacturers were not on the same basis as regards competition. Those concerns whose output—I speak now as of about the year 1890—those concerns whose ouput was of a character and of sufficient tonnage, and who controlled sufficient capital to enable them to convert their works from iron to steel, did so, but there were a vast number of those whose character of product was of a less heavy nature, such as sheets, small bars, light plates, etc., who neither had the capital nor the output to warrant them in making, or rendered it possible for them to make, this change. There was also another class of establishments, namely, the blast furnaces who had heretofore supplied the puddling furnaces or the rolling mills with their pig iron for making bars. Those concerns found themselves without customers and they in turn were forced to develop a product which would take the place of their former ones. These smaller concerns were buying, as I say, to the best of their ability, their billets, blooms, and slabs

from the larger concerns, who were making them in a certain sense as a by-product during the years from about 1890 to 1896.

"These revolutions which I have spoken of, due to the introduction of basic, open-hearth steel in place of wrought iron, were the fundamental reasons for all the earlier aggregations of work which took place about the year 1898, and through that year down to, say, 1900. Certain of them were integrated like the Federal Steel and the Carnegie Steel Company backward to their supplies of raw material, and to the extent which they had formerly been consumers, they to that extent became producers. The other concerns, like the National Steel, were composed largely of blast furnaces that had lost their custom for pig iron and who found themselves compelled to produce, instead of pig iron, billets and blooms for sale to those who had formerly used wrought iron. The Tin Plate, the Sheet Steel, the Hoop, the American Steel & Wire were composed of concerns who individually were neither able, for want of capital or amount of output, to change from wrought iron or to manufacture steel in sufficient quantities to make it commercially profitable to do so.

* * * * * * *

"The Tin Plate Company had been a consumer, and not a producer, of wrought-iron product, and, in fact, the manufacture of tin plate had not taken place in this country until after the introduction of the use of open-hearth steel. So far as I included them in my answer, I meant to state that they individually were unable to produce the raw material from which their finished product was made, but by combining these individual units they would be enabled to do so economically."

The tendency of the steel business during these years towards concentration, combination, rounding up, or continuity of operation is reflected in the census figures. On the one hand is an unprecedented growth in the volume of the steel and iron business done and of the increase of capital; on the other hand is a striking decrease in the number of establishments doing it. Thus Bulletin No. 78, Census of Manufacturers, 1905, Iron and Steel and Tin and Terne Plate issued 1907, by the Department of Commerce and Labor (volume 13, pp. 4948, 4950), says:

"The growth of steel production has been the heaviest of any portion of the iron and steel industry. The product for 1900 shows a gain over that of 1890 of 6,510,348 tons, or 155.9 per cent, or an average increase of about 650,000 tons per year. The product of 1890 shows a gain over that of 1880 of 3,147,271 tons, or 306.8 per cent, an average increase of nearly 315,000 tons."

Whether the cause of this enormous increase of production on the one hand was due to the rounding-up process, of decreasing the number of plants, and further expanding those that remained, the bulletin in question is, of course, speculative, but does show that decrease in the number of corporate plants with increase of capital in [124] those remaining was the actual fact in the iron and steel business. In that regard the same bulletin showed that there were in 1880 in the United States substantially 1,000 of such establishments with a capital of $230,000,000. By 1890 these 1,000 had decreased to 838, but the capital of those that remained was increased to $425,000,000. By 1900 the 1,000 establishmets of 1880 had again decreased to 763, but the capital of those that remained had grown to over $600,000,000. During the same period the separate blast furnace establishments had also decreased. In 1880 there were 483; in 1890, 377; and in 1900, 273. This census evidence of widespread general change, readjustment, and concentration by practical men in the iron and steel business would seem necessarily to have had some impelling cause—economic, mechanical, metallurgical, or administrative—back of it. And, in the absence of proof to the contrary, the conclusion of Mr. Roberts would seem reasonable that "these revolutions which I have spoken of, due to the introduction of basic, open-hearth steel in place of wrought iron, were the fundamental reasons for the earlier aggregation of works which took place about the year 1898, and through that year down to say 1900," and that the business reasons which induced practical steel men to so act was the fact that, unless they did so, the changed conditions of the steel business might force them out of business. In that regard the testimony of Mr. Roberts (volume 13, p. 4951) is:

"Coming down to the year 1900, very many, if not the majority, of those concerns who did not integrate sufficiently to control their supply of raw material failed in business or were abandoned by their owners. * * * There are successful concerns to-day [page 4953] who have not integrated in the manufacture of their own steel, but those are of a character where tonnage plays no part. Where you come to a large tonnage, however, or a comparatively large tonnage, I know of no successful concern to-day which has not integrated. * * * There never [page 4956] was a year during that ten-year period that there were not numerous failures in the iron and steel

trade with considerable aggregations of capital. I will say they were very numerous; so numerous that probably in some years it would amount to more than 100 failures in that period."

Light is thrown on some phases of this integrating process by the testimony of the president of the Republic Company, whose development and expansion has been heretofore noted. He says (volume 2, p. 732):

"We have practically eliminated all of our scattered iron mills, have concentrated them in the operation at a few points of production, so to-day we produce practically but little iron and are manufacturing about a million tons of steel per annum.

"Q. This, I take it, is what you call an integrating process, was it not?—A. Yes, sir; that was part of it; the addition of the mineral and coke and blast furnaces and balancing-up operations generally completed the integrating process.

"Q. So that you were able to handle every feature of the process from the mining of the ore to the putting on the market of the finished product?—A. Everything, except transportation.

"Q. And so far as transportation is concerned, I understand you owned a fleet of vessels on the Lakes to bring your ores?—A. We have three vessels we own and have an interest or a part interest in some others. * * *

"Q. You are adequately supplied with lake facilities?—A. No; not quite, not balanced up. We are large carriers on the Lakes in addition to our own fleet. * * *

"Q. I judge from your testimony that this integrating process that you spoke of attended your development of the steel [125] end of your business; am I right?—A. You are.

"Q. You did not need that so much, or at all, when you were simply manufacturing iron?—A. No; it was done for economic reasons and also for trade reasons."

This testimony serves to show how radical, extensive, and enforced was the steel integration, which, summed up in a few terse words of this business man, really meant a rounding up and readjusting of everything, as the witness says, "from the mining of the ore to putting on the market of the finished product," and an increase in that company's case of resources (volume 5, p. 1856) from $600,000 to over $23,000,000. From these figures the insistent necessity of integration in the steel business will be seen.

Coincident with these mechanical and metallurgical changes, another basic change of peculiar and dominating importance in the steel business was also taking place. This

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was in freight and transportation. This change, it will be seen, not only restricted the range of a plant's market, but by doing so necessitated what might be termed locality integration. The chief factor in the manufacture of steel (volume 13, p. 4953) is labor, and the next is the locality where it is produced (volume 10, pp. 3961, 3987, 3988, 4059, 4060, 4061); being of great bulk, the transportation of the raw material to where it is made and the freight to where it is used (volume 11, p. 4344) are the factors decisive of its being profitably made and sold. As illustrative of the vital character of freight as a factor, the proof (volume 12, p. 4815) is that the Steel Corporation uses 45,000 tons of ore alone a day, not to mention coke or limestone. The delivery of the steel to the user and the net gain over cost received from him is, of course, the practical test of steel making. From these self-evident business truisms it follows that the tonnage of bulky steel products restricts its steady, natural, and sustaining market to the consumption of the territory near its place of production; for example, great as is the consumption of steel in the New York district, and ample as is the productive capacity of the United States Steel Corporation to supply it, yet the proof (volume 10, p. 3782) is that the Steel Corporation does "very little business here (New York) compared with that done by the mills in Bethlehem, Phœnixville, and mills located near here." Prior to the regulation of freight rates by the Government through the Interstate Commerce Commission, freight stability was unknown. Special rates to large shippers, cuts in freight rates, and secret rebates were common practices between the steel producers and the railroads, and these enabled steel manufacturers to ship bulky products into territory naturally supplied by other manufacturers, and by these cuts, special rates, or rebates to dump their surplus product in districts which they could not enter if they paid proper freight charges. Thus, at one time, the Illinois Steel Company, by virtue of getting a 45-cent rate from Chicago to Yokohama on export business, was able to ship rails to Japan. This freight rate (volume 10, p. 3882) could not be had now that freight rates are regu-

lated. The pinch and prohibition of freights in narrowing markets may be best illustrated in a letter found in volume 11, p. 4286, where a great steel maker in 1899 said:

[126] "The greatest blow we have received is in the rise of railway rates, and we should address ourselves to rendering these impossible. There is no reason why we cannot ship to Conneaut and to western points by boat from Conneaut, and I would spend a good deal of money and a good deal of attention upon this. The mere fact that you begin shipping in that way by boat will bring railroads to their sense. I also think that something can be done shipping by Erie Canal from Conneaut. I think the Lorain or somebody else put a line of boats upon the Erie, and I know that a paper manufacturer of Erie does all his transportation by line of boats, which he tells me costs him about 75 cents per ton. One shipment to New York by canal would give your railroad friends much anxiety."

When, however, under the regulating power of the Government, freight stability was enforced, the steel maker's market was at once locally restricted, and his only way of overcoming the regular, stable, adverse freight rate was to integrate locally; that is, to erect or acquire other mills in the market locality from which freight forbade his heavy product entering. The embargo laid by freight on distant markets is simply a business fact, and it suffices to say that, while the Government by this enforced transition of the steel shipper from the era of unstable freight cuts and rebates to an era of freight stability in the end contributed to corresponding benefit and stability in the steel maker's business, yet it must not be overlooked that, in thus narrowing his market, the steel maker was compelled to broaden his market by expanding his operations so as to manufacture in additional localities. Coincident with this tendency to integration and to the consequent widening of variety of product and to the entry of steel into new fields, a radical change in the variety of ore supply was necessitated. In thinking of iron ore, we are apt to regard it as simply ore, and overlook the fact that there is a radical difference in different ores. In the earlier manufacture of iron practically any ore could be used, but as the steel era came along, with its chemical tests (volume 11, pp. 4334, 4141, 4375; volume 13, p. 4997) and the specified requirements incident to its use in varieties of articles, the particular character of the ore base

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became more and more a matter of importance. The practical proof of this wide range of various ores required is illustrated in the proofs, which is that, even with the wide range of ores owned by the Steel Company, it is at times unable to meet the requirements of purchasers. In that regard the proof is (volume 10, p. 3835):

> "We (the Steel Company) purchase a great many rails from our competitors; occasionally our people in some country will take an order for a specification which it may not be possible for us to fill. At times we have bought rails which called for Cuban ores to be used as a basis for manufacture, and we bought those rails from the Maryland Steel Company."

We noted above (volume 10, p. 3733) where 18 different kinds of billets were required in a wire mill alone. The proof is (volume 11, p. 4375; volume 13, p. 4977; volume 12, pp. 4813, 4821) that it is only by a scientific mixture of different sorts of ores that steel of the large range of specified steel requirements can be made. This simple statement of a few lines, when carried into practical business operations, means the furnishing of many varieties of ores that may be as far away from a blast furnace as Minnesota, Chili, or Cuba. These must [127] be bought, mined, transported, fluxed, and treated in order to meet, for example, the exacting structural requirements of a steel rail. To successfully produce that rail in great tonnage, which, under the proofs, is a business necessity, every step in that long spread from the ore in the ground to the finished rail must be under the integrated control of that agency which is ultimately held responsible by the railroad for the rail. In that regard, we quote from the proofs:

> "Starting from the ore fields. Individual concerns owned individual mines. No concern was sufficiently large to own groups of mines of different characteristics and qualities. All metallurgical people know that the best results are obtained by scientific mixtures of different sorts of ores, and, by consolidating the ore interests of all these companies, we were able to give each individual company the ideal mixtures in order to produce the most economical and best results. * * * To one familiar with the steel and iron-making industries the advantages of so doing are enormous. The transportation of material affords equal opportunities to economize. Ships do not need to wait until each particular cargo can be loaded for each particular works, but can be kept moving steadily and assigned

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to various works while in transit. Mills that formerly had to make a great variety of articles, by reason of consolidation, are enabled to run steadily on one line, producing far greater tonnage and at very much less cost."

The result of these radical and forced changes in steel making evidenced itself in the rapid and widespread fever of integration by consolidation that took place toward the close of the century. Whether, from such consolidations, monopoly, rise in prices, and restraints of trade were hoped by many of their promoters to be obtained, it is certain that the deep-lying motive which led practical steel men to put their plants into such consolidation was the recognition of the absolute business necessity of integration as a condition of staying in the steel business. Thus the Carnegie Steel Company, occupying, as it did, the commanding position in the steel trade, varied as were its products, having fully 70 per cent of what foreign trade there was, and having the foremost place in the home markets, itself felt the necessity of and was preparing to enter on further integration by widening the variety of its product. While leading in some lines, it was deficient in others, notably pipe and wire (volume 11, p. 4143), which consumed much of its basic products. In the minutes of that company of July, 1900 (Government Exhibit, volume 6, p. 1881, and also volume 11, pp. 4281, 4282), its president stated:

"I have already expressed my views on the matter of rails referred to by Mr. Carnegie. For myself, I do not see that there is anything left for us to do but to build a hoop and a wire mill. The American Steel & Wire Company have served notice on us for cancellation of their contract with us. The American Steel Hoop Company are buying but little from us. With the loss of customers that we have sustained, it will leave us in the position to have no four-inch billets to make. There does not seem to be any other place at present to place them. The contract with the Union Steel Company would not prevent us from going into the wire business. It is very doubtful, indeed, whether they would take a full tonnage from us. It looks very much as though we would have to put our steel into the finished article. We formerly sold to the constituent companies of the American Steel & Wire Company and the American Steel Hoop Company from 30,000 to 35,000 tons of billets per month. We have done all that we can to endeavor to get them to take their tonnage from us, but so far we have been able to accomplish nothing. I do [128] not see how we can stop at wire rods. I think we shall have to finish the

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wire and nails, because there are no customers for wire rods at the present time. We have figured that a hoop mill will cost about $800,000, a rod mill about the same amount, and a mill to make barbed wire and nails would cost about $1,000,000, or a total expediture to go into the hoop and wire and nail business about $2,500,000.

In a letter embodied in such minute, Mr. Carnegie said:

"I do not think that there are many customers for rods remaining, and believe that if there are they will not exist for a long time. We should not go into rods, as I see it, unless we also go into wire. No use going halfway across the stream. Should aim at finished articles only. It is coming to this in all branches."

That these minutes represented the then purpose of the company was stated by its president, who testified (volume 11, p. 4282):

"We adopted the plan at that time of building mills to finish our own steel that we had formerly sold to those companies."

So also had the Carnegie Company determined to integrate by adding the important items of pipes to its finished product. The purpose of this was to create for itself and in itself a customer that would use part of its product by making it into pipe. This item of steel consumption, embracing oil, gas, water, irrigation, and kindred fields, the Carnegie Company, as we have seen, did not make. That this vast field of basic steel consumption was not sufficiently filled is shown by the fact that they planned to spend in additions for such pipe-making mills, excluding land, $12,000,000. The plans for this enterprise were entered upon in 1897 or 1898 (volume 11, p. 4295). It will also be seen, in discussing later the acquisition by the Steel Corporation of the Seamless Tube Company, that the Carnegie people were carrying on substantial experimental work at the Seamless Company's plant with a view to itself entering the tube field (volume 13, pp. 4198, 4199). Efforts had been made to get a site near Pittsburgh, but sufficient acreage for the large works in view could not be found. Meanwhile, a site of 5,000 acres was secured at Conneaut, on Lake Erie, where the company's ore steamers coming from Lake Superior delivered the ore to the company's railroad for transit to Pittsburgh. From this point (volume 11, p. 4297; volume 11, p. 4286), water transportation

for pipe was available to seaboard and to the entire territory tributary to the Great Lakes. The testimony (volume 11, p. 4297) is that this proposed widening of the Carnegie Steel Company's product variety to include pipe and wire products was absolutely "in good faith as indicative of the intention and purposes of the Carnegie Steel Company." In that regard the president of the company (volume 11, p. 4390) testified:

"Q. Speaking about the purpose of the Carnegie Company to go into other lines of business and the finishing of its semi-finished product, do you remember whether the scheme talked of in the middle of 1900, as Judge Dickinson brought out from you, of building your wire mills, was persisted in to the end of that year?— A. The scheme to ultimately do so was. My recollection is that the operations were deferred owing to financial conditions at that time in our company; but the idea of ultimately extending our lines into all these finished products was not conceived in that year. It had been discussed for some years before, and plans made, and a general policy outlined for ultimately doing it."

[129] As evidencing not only that fact, but that it was a necessary and far-sighted integration (one called for by the legitimate future of the business), will appear from the fact that, after the Steel Company was formed and its comprehensive plan of complete integration was carried out, that company expended $13,000,000 (volume 10, p. 4076) in building the pipe plant which the Carnegie Company in 1900 planned to build, and it will be noted further that it built it in the immediate Pittsburgh district, on ground near the National Tube Works, where the Carnegie Company was not able to get the required site. All of which seems to strengthen and confirm the conclusion of the insistent requirement of integration in the steel trade at the close of the century. The like compulsory integrating influence thus shown in the Pittsburgh district evidenced itself also in the great Chicago steel district. In that district the Illinois Steel Company held the same commanding local position as the Carnegie Company in the Pittsburgh. Its natural market was the Chicago district (volume 6, p. 2215; volume 12, p. 4734). It had a rail market in Canada at times which could not be reached by the Carnegie. In spite of

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the allegations of foreign trade made by its then management, it really had little or none and really could have (volume 6, p. 2215; volume 10, p. 3829) no profitable foreign trade. Such foreign trade as it had to Canada was of the spasmodic character heretofore referred to. It had large plants at Chicago and Joliet, Ill., and at Milwaukee, and had railroad properties, but its product of basic open-hearth steel was, even in 1890, only 190,000 tons, as compared with the Carnegie Company's 1,250,000 tons. It (volume 14, p. 5505) lacked the finishing units of sheet steel, steel hoop, and tin-plate mills (volume 12, p. 4735), that were afterwards acquired in pursuance of the integrating policy which the plans of the United States Steel Corporation contemplated. Practically it had no substantial wire (volume 12, p. 4734) or structural output and no tube or pipe output at all (volume 12, p. 4735). In 1898 the Illinois Steel Company entered on an effort to integrate by consolidation and with foreign trade in view (volume 18, p. 4718; volume 14, p. 5472). In pursuance of its integrating policy, the Illinois Company formed the Federal Steel Company, which took over the Minnesota Iron Company. This gave the Federal a Lake Superior ore reserve, its own railroad transportation to Lake Superior, its ore fleets to Chicago and lake ports. It also took over the Lorain Steel Company, which gave it mills in the Cleveland district, and at Johnstown, Pa., in the Pittsburgh district, and a relative approach to the seaboard. These mills were then regarded (volume 12, p. 4714) as enabling the Federal Company to supply foreign trade from those districts. This expectation was to that extent justified, for the proofs show (volume 10, p. 3813) that, so far as their individual products are concerned, the Lorain and Johnstown mills are now very substantial factors in the foreign trade developed by the Products Company. But apart from these mills the Federal Steel had no facilities for entering into foreign trade, and the proof is that, even with all the facilities for entering such trade possessed by the Steel Company (volume 10, pp. 3828, 3829), but 2 per cent of the product of the Illinois Steel Company now goes into for-[130]eign trade, and that part goes, not into such general

trade, but only into such Canadian markets as its location permits. The integrating steps thus mapped out are recited in the proofs (volume 12, p. 4695), but these partial efforts at complete integration proved disappointing in that it was not complete enough. In that respect the proofs are (volume 12, p. 4718).

"The plan and organization were good so far as they went, but the organization was too small; the capital employed was too small; the facilities for finishing steel were not sufficiently diversified. We lacked finishing mills, and our locations were not the best or good enough to extend foreign trade as we had hoped."

Realizing these limitations, and that the Federal Steel Company's operations were not rounded to a successful manufacturing future, the proofs (volume 12, p. 4721; volume 14, p. 5473) show that steps had been taken just before the United States Steel Corporation was formed to raise from $40,000,000 to $45,000,000 in further integrating the Federal Company. That such steps by the Federal Company had as their real basis the bona fide commercial and industrial requirement of further integration is, just as we have shown in the case of the Carnegie Steel Company, also shown in the Federal's case by after events in connection with later events in the Chicago district. The record (volume 11, p. 4143; volume 6, p. 2418) shows that the Federal Company was not equipped to make pipe and sheets at all, and plates only to a relatively small extent, and had no complete line of finishing mills. It further shows (volume 8, p. 2978) it lacked adequate open-hearth capacity, did not have the money (volume 12, p. 4762) to extend it, had (volume 11, p. 4226) very limited structural product facilities, and even with its ore supplies it had (volume 11, p. 4384) to buy other ores to get the proper mixtures. After the Steel Company was formed, in order to supply the needed rounding-up equipment of the Chicago district, which the Federal lacked, the Steel Corporation made large additions in that district at Gary, in the center, and at Duluth on the northern limit, with a view to reaching from Duluth the western Canadian market. In that regard the proofs (volume 10, p. 4074) show that some $80,000,000 were spent in building at Gary

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open-hearth plants, a rail mill, structural steel plants, bar mills, sheet mills, and plants of the American Bridge Company and the American Sheet & Tin Plate Company, in all of which facilities the Illinois and Federal Companies were deficient. Along the same line the proofs (volume 10, p. 4075) show that $10,000,000 are being expended at Duluth to erect blast furnaces, open-hearth furnaces, and bar and merchant mills with which to supply the American and Canadian Northwest. As evidencing this trend to further integration, the desirability of the Federal Steel Company acquiring the Carnegie Company and thus integrating eastward was, in 1899 (volume 12, p. 4722), brought to the attention of the Federal Steel Company by a representative of the Carnegie Steel Company, who then suggested:

> "That it would be a good thing for the Federal Steel interests to purchase the Carnegie property and perhaps with them some other properties, which included finishing mills of various kinds, suggesting companies, the Wire Company, and the Tin Plate Company, and some other companies."

[131] The matter was actively taken up by the Federal Company, but eventually fell through (volume 12, p. 4723), because "Mr. Frick was not willing to agree that the whole Carnegie organization, including himself, would remain in the company and assist in carrying on the business." The proofs further show that early in 1900 Mr. Schwab, the president of the Carnegie Company (volume 12, pp. 4724, 4725), urged the buying of that company by the Federal, and efforts were again made to have Mr. Morgan, who was a member of the board of the Federal Steel Company, take it up, which he declined to do (volume 12, p. 4723).

This demand for integration which thus evidenced itself in these two leading companies, each attempting to integrate back to the base of supply and also into more extended and diversified finished product, also evidenced itself in other branches of the steel trade. This was the integration of mills which were large consumers of plates, ingots, billets, sheets, rods, structural iron, and other semi-basic products. Without specifying all, we may refer to the steady integration of these various sub-divisions of the steel trade.

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This began in December, 1898, when the principal tin plate manufactories integrated by consolidation into the American Tin Plate Company. In January, 1899, the American Steel & Wire was formed by a consolidation of all the leading wire product manufacturers. This was followed in February, 1899, by the consolidation into the National Steel Company of 12 per cent of the ingot production of the country, which was located on the eastern side of Chicago and the western side of the Pittsburgh district. The same month saw the National Tube Company formed by great concerns making various kinds of tubes and pipes. In March of the same year, sheet-steel makers in large tonnage combined to form the American Sheet Steel Company, and in April of the same year, the American Steel Hoop Company was formed by the leading makers of hoops, bands, and cotton ties. While the American Sheet, the American Hoop, and the National Steel were separate companies, yet for integrated continuous working they were in effect (Topping, volume 2, pp. 636, 684, also volume 12, p. 4764) necessary to each other, Mr. Topping testifying:

"You will remember there was formed the Steel Hoop and the American Sheet Steel. The formation of these companies, as I understood at the time intended, was to balance up National Steel so as to make it more nearly self-sustaining. In other words, the National Steel was the raw producing steel company to supply the crude material to the Sheet Steel and Steel Hoop and Tin Plate Companies."

This integrated relation is no doubt the manufacturing feature on which it was (volume 12, p. 4747) insisted that the finishing companies would not sell to the Steel Corporation unless the National was also purchased, as Mr. Carnegie (volume 12, p. 4747) insisted should be done. In the same month we find the principal structural and bridge erectors and producers forming the American Bridge Company. In connection with this consolidating and integration of structural manufacturers and fabricators, it is but just to note, as illustrative of compelling forces outside that industry, the demands which the business world was making upon the structural steel industry. Thus in re[182]ferring to the American Bridge Company, and its carrying forward at a

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later date this policy of expansion and local integrating of its works, the proofs (volume 10, p. 3961) show that such great operations as the tall buildings of recent origin, such railroad work as the Hell Gate Bridge, and such national work as the Panama Canal, practically necessitate the existence of such companies. In that respect the proof is railroad bridges are—

"confined to those companies having the largest plants and those equipped for that sort of work. There are very few companies, for example, that could build a bridge like the Hell Gate Bridge, involving 40,000 tons of material and an incidental expense of perhaps $800,000 to get the false work together. When we secured that contract we had to expend immediately $160,000 for tools. While we were a very large concern and had a very well-equipped plant, we were obliged to buy $160,000 worth of tools for that particular work. * * *

"Q. Has there been any change in the style and size of the structures in the last 12 or 15 years which affected the size of the plants that are necessary in order to execute the contracts?—A. Yes. * * * Since that time buildings ranging from 18 to 20 stories up to 36 stories have been built. * * * We fabricate the steel and deliver it to the site and erect it."

The proofs also show it is necessary to have structural plants in different localities. In that regard (page 3961), and referring only to the Middle West equipment, the proof is that the American Bridge Company has in the West—

"a plant at Toledo, one at Ambridge (Pittsburgh), one at Gary, Ind., a large plant and a comparatively new plant; one at Chicago, one in Minneapolis, one in St. Louis, and one in Detroit. * * * It is a zone business more or less." A zone business is a "business within 300 or 400 miles of where the plant is located. It is a question of freight rates.

"Q. You mean by that, bridge business or structural business for buildings?—A. Both."

They further show that it requires a large plant to deliver such contract requirements so as to coördinate with other parts of the work. The proof is (page 3961), referring to the work done by the American Bridge Company along the Panama Canal:

"We have done about $8,000,000 worth of work there for the Government, so far. * * * We are building the emergency dams, building the transmission towers and the administration building and the machine shops, involving about 6,000 tons, and we have

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been doing a great deal of work outside of the lock gates which were furnished by McClintic-Marshall Company. I think we have done the major portion of the work, and it has always been work that we had to get out pretty promptly, and sometimes have to set aside other work to accomplish the deliveries required."

It will thus be seen that these large modern operations practically necessitate correspondingly large manufacturing facilities and financial resources to adequately and successfully meet such product demands. These rapid, widespread, and isolated integrations of different sub-divisions of the steel trade cannot be reasonably explained on the sole theory of a widespread, dominating purpose in each of these aggregations to monopolize or restrain trade. In the first place, the proof is simply one-sided that they did not control trade, and that in spite of their size and large proportions of then existing trade, their competitors, as we have already seen, have increased more [188] rapidly than they. So that, while there may have been in the minds of those who formed them the possibility of monopoly and increase of price, we are inclined, from a study of the proofs in this case, to the belief that the real underlying influence was the economy of management, the locality of production and market, and the continuity of process which resulted from such integration. Take, for example, the last one formed, the American Bridge Company. During the years it has been a subsidiary of the United States Steel Corporation its business has increased 42 per cent. In that time its competitors have increased their business 164 per cent. During that time the American Company has had the help of all the associated subsidiary companies of the Steel Company, it has shared in all the economies of management, coöperation, and financial help rendered by the parent company, yet with all these aids, its competitors have increased their business four times as fast as its own. It would seem, therefore, that the American Bridge Company has even less hope or power to monopolize when it was originally formed and stood alone, when it could not, when bought by the Steel Corporation, so monopolize the steel structural business of the country. In view of such facts, we have been impressed with the view that these con-

solidations and integrations, accomplished or in view at the close of 1900, were more largely made with a view to meeting the changing conditions in the steel trade in its transition from iron to steel and in its adjusting itself to the progress, improvement, and development in that industry rather than with monopolistic intent. The proof in regard to the reasons for the formation of the American Bridge Company fairly states, as it seems to us, the basic reasons which led to the unifying of the separate branches of the steel industry. Thus in volume 2, page 874, it is testified, with respect to that company's formation, as follows:

"A. The purpose of the formation of the American Bridge Company was simply along the lines of economical shop management, and had no reference whatever to any monopoly or to securing the entire industry of the country. The plants which became a part of the American Bridge Company were believed to be in a position to be operated more economically as a combined whole than as independent units, and the foundation of that company was the securing of a steelworks whereby they could obtain, to a large extent, the control of their raw material for fabrication, the basis of practically all structural contracts being one of time; the time of delivery being the most important factor in practically 90 per cent of all contracts taken. These independent units found themselves at that time in a very disadvantageous position, due to the fact that the large steel plants were commencing to do their own fabricating, whereby they were enabled to control their rolling mill supplies and make such deliveries as these independent fabricating shops, having no control over the raw material, could not do.

"There was also another reason for it, namely, that contracts were increasing so rapidly in magnitude that as independent units they were unable to secure sufficient working capital to enable them to fabricate these large tonnages.

"You can trace from the very beginning of the securing and assembling of their raw material through the designing, fabrication, transportation, and erection work, and the increase in their working capital, the reasons for putting together those plants, which were of two principal characters: First, they were partly competitive, I might say, by reason of a greater or less similarity of output and by reason of a common territory into which the transportation [134] rates enabled them to ship the material; and, second, plants absolutely noncompetitive, due (a) by reason of an entirely dissimilar output, and (b) by reason of their geographical location.

"The whole scheme was one to decrease cost of production and to operate along the lines of what, at the present time is termed 'scien-

tific shop management.' As a matter of fact, any advance in prices was not discussed to my knowledge; nor did any such enhancement ever take place. Competition at all times was extremely severe, and the profit on the output decreased from the time of the formation of that company until the present day. A number of concerns were offered to the American Bridge Company at the time of its formation, which were declined for various reasons, because they did not seem to be essential in the rounding out of the proposition that I have referred to."

As we have said above, it may have been the fact that, apart from the operative necessity that led to many manufacturers putting their works into these consolidations, there was probably a purpose also to monopolize and restrain trade, yet by the time the Steel Corporation was formed the inability of these prior combinations to so monopolize trade was proven to those who gave heed to facts and figures. For example, Government Exhibit, vol. 7, p. 2017, shows that the production in 1898 of the pig iron plants subsequently acquired by the Steel Corporation had been 46 per cent of the country's total production of 1898; in 1900, the proportion of these plants had fallen to 41 per cent. In the same way, Bessemer plants afterwards acquired by the Steel Corporation had fallen from 73 per cent in 1898 to 70 per cent in 1900. The Bessemer rail plants had fallen from 68 per cent in 1898 to 61 per cent in 1900; wire rod plants had fallen from 97 per cent in 1898 to 82 per cent in 1900; structural shape plants had fallen from 66 per cent in 1898 to 61 per cent in 1900; plate and sheet plants had fallen from 67 per cent in 1898 to 66 per cent in 1900; while the wire nail plants subsequently acquired by the Steel Corporation, which had in 1898 produced 89 per cent of the country's total production, had by 1900 dropped off to 78 per cent. Indeed, as we gather the net results of these different plants in varied steel lines, the acquisition of which (1901) by the Steel Corporation is alleged to evidence a purpose to monopolize, the facts and figures show that in only one product, namely, that of ingots and castings, had there been an increase of proportion in the three preceding years by these plants and in nine other branches, the plants which the Steel Company subsequently

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acquired, had in point of fact in those three years clearly shown their inability to monopolize by a decrease of relative percentage ranging from 1 per cent in the case of plates and sheets to 16 per cent in wire nails. And that this three years' decrease in actual monopolistic control was the normal trend of the steel business is shown by the fact that such proportions continued to decrease after the Steel Corporation was formed. As an example of this tendency we may cite the wire plants subsequently acquired by the Steel Corporation, which in 1898 had 88 per cent of the country's production and in 1890 had fallen to 72 per cent, had by 1911 so continued to lessen their proportion of the part sold in the American market that it was then but 42 per cent of the country's production.

Moreover, these combinations were the subject of Congressional investigation from 1898 forward, and the proof (volume 28, p. 11760) [135] is that while the results of that investigation were published (they are not in evidence before us) they have resulted (volume 12, p. 4755) in no adverse action by the Government. From all which we find support for our conclusion that these former combinations were largely the result of economic and manufacturing plans for the production of product rather than for monopolistic plans for selling product. At any rate, the proof is that, as a practical business experience, these combinations which existed prior to the Steel Corporation had, in the three years preceding the formation of the Steel Corporation, shown a waning power to monopolize, if any such power existed when they were formed.

We have thus seen the unifying, integrating, and rounding-up influences which were irresistibly forcing those engaged in the practical work of making steel to form these prior combinations of integrating units. The proofs show that Mr. Morgan was a director in the Federal Steel Company (volume 12, p. 4724), but that he personally knew nothing of the steel business. His firm had taken part in some of these consolidations, but the suggestion of the absorption by the Federal of the Carnegie Company had not appealed to him. The proof is (volume 12, p. 4274) that while he was a

member of the board of directors of the Federal Steel Company and was financially interested in it, he had probably never attended a meeting of the board and taken no part in its management and knew nothing of the practical steel business. The conditions in the steel trade being such as we have shown above, Mr. Morgan, in December, 1900, attended a dinner in New York where some 80 men prominent in steel manufacturing and the banking business were present. This dinner was given to Mr. Schwab, the president of the Carnegie Steel Company. Whether the dinner was given for the purpose of affording an opportunity of interesting Mr. Morgan in buying the Carnegie Steel Company, which the bitter differences between the partners in that company (volume 6, p. 2189; volume 14, pp. 5655, 5656) and the desire of Mr. Carnegie to retire from business then made possible, there can be no doubt, in view of the outcome, that Mr. Schwab then gave to the bankers present, and particularly to Mr. Morgan, who was seated beside him, such a comprehensive view of the steel trade as was well calculated to show the possibility of carrying integration to its logical manufacturing and merchandising efficiency, and afforded the Federal Company, of which Mr. Morgan was a director, the opportunity to carry out, on a large scale, the policy of integration that company had planned and had (volume 12, p. 4719) attempted to carry out. And there can be no doubt that Mr. Schwab realized that if a sale of the Carnegie Company could be made the grave discord among the partners of the Carnegie Company (volume 14, pp. 5655, 5656) which had arisen, could be ended, and the policy of integration on which, as noted, that company had also embarked, could be carried out by some larger organization. Indeed, the evidence is clear that there was an earnest desire on the part of the owners of the Carnegie Company for several reasons to sell. The situation was summed up by James H. Reed, who (volume 14, p. 5655) testified:

"Q. The Carnegie management was originally a partnership, I believe, was it not?—[186] A. A limited partnership.

"Q. When was it turned into a corporation?—A. In the spring of 1900; turned into two corporations.

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"Q. What is that?—A. Two corporations were formed at that time.

"Q. What were they?—A. The Carnegie Company was the holding company of the stocks of the Carnegie Steel Company, the Frick Coke Company, and the Bessemer and Lake Erie Railroad Company; the Carnegie Steel Company was organized under the laws of Pennsylvania and was the operating company.

"Q. What do you know of the desire of the stockholders of the Carnegie Company to sell out in the year 1900?—A. I think they were all desirous to make some permanent disposition of the property, for several reasons.

"Q. There had been dissensions among the partners a year or two before, had there not?—A. Yes; that is the mild word for it; there had been quite serious dissensions between Mr. Frick and Mr. Carnegie as the leaders.

"Q. Resulting in litigation?—A. Resulting in litigation.

"Q. That was ended, I believe, by the organization of the corporation or corporations?—A. Ended by the formation of the two corporations of which I have spoken.

"Q. Was entire harmony restored between the gentlemen by its organization?—A. No, sir; it was not.

"Q. Now, did you learn from these gentlemen themselves of their desire to sell out in 1900, or from any of them?—A. Why, I could not say that it was said in so many words, but I know it was their desire, as I say, that some permanent disposition should be made of the property for the reason that Mr. Carnegie was growing old. He had the majority interest in the company. A manufacturing company, like the Carnegie Steel Company, that was intensely active could not be successfully operated with the majority interest in the hands of trustees in case of his death. He himself was anxious to get out of business and get his interest in these concerns put into investment shape, and so you can see that generally there was a desire among all of them to have some kind of a disposition made of the property during his lifetime that would be permanent.

"Q. Was Mr. Carnegie giving a personal and immediate attention to the business during that time?—A. He was, but not in the sense of being on the ground. He was either in New York or Skibo, and was getting constant reports, and he was seeing the various officers of the company frequently, and he was sending them advice from time to time.

"Q. Skibo is where?—A. In the north of Scotland.

"Q. About how much of the year was Mr. Carnegie spending there at that time?—A. About half of it.

"Q. And the other half in New York?—A. In the United States, either in New York, or during the winter in the South.

"Q. But formerly, in earlier days, he had been in Pittsburgh and attended personally and actively to business, had he not?—A. I believe until about 1880, when he moved to New York.

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"Q. Was that so early as that?—A. Yes, I think about that time. But he was within practical reach of the business whenever he was in the United States.

"Q. He could reach it by letters, could he not?—A. Yes, and telegrams.

"Q. Do you know whether he was desirous of giving up even that connection with the business, aside from his desire to put his holdings in investment shape? Do you know whether he wished to be relieved of the care and [187] attention and thought that the business required of him, and to devote his time and thought and energies to other things?—A. Yes; I think he was.

"Q. What was it that he contemplated, if you know, from him?—A. What he has done since; that is, devoting himself to philanthropy and peace, and one thing and another."

With these matters no doubt in view, Mr. Schwab made an address as already quoted, and brought into clear relief three propositions: First, that steel making had then reached the limit of improvement in metallurgical methods; second, that further advance was dependent on integrating processes; and, third, that to take care of the growing steel production a great foreign trade was possible. It is suggested that this whole talk of integration or rounding up of manufacturing facilities is an afterthought, and a mere cloak to veil a concealed purpose to monopolize trade. Let us examine what the proofs show in that regard.

Looking only at the two great companies, the union of which made possible the steel company, the Federal and the Carnegie, we have the fact (see statements in bill, volume and title, "Pleadings," pages 3 and 4) that both these companies had been themselves gradual integration growths, and their managements were then trying to integrate them further. The Illinois Steel (volume 14, p. 5472; volume 12, p. 4698) had entered into the wider field of the Federal; it had integrated back to ore; it was trying to integrate locally into eastern markets through Lorain and Johnstown, had considered the acquisition of the Carnegie Company, and had planned to spend (volume 12, pp. 4719–4721; volume 14, p. 5473) some forty to fifty millions of dollars in further broadening its field of products. For making the great basic products of open-hearth steel, which was then becoming the dominant factor in steel, the proofs (volume 8, p. 2978) show the

Federal was not equipped. The subsequent location of the great open-hearth plant at Gary alone (volume 10, p. 4074) shows the existence of the Federal's prior need of further integration without reference to the fact (volume 10, p. 4074) that it was lacking in finishing mills for rails, bars, structural, sheets, etc. In the same way we have seen the Carnegie Company was lacking in finishing plants for tubes, wire, hoops, and many other finishing plants to use its subbasic product. These patent facts and urgent needs—facts which, as we have seen, were set forth at the time in the minutes, letters, and communications heretofore quoted—evidence the existence of the practical manufacturing necessity of both these two great companies either building or buying finishing mills. That such purpose of manufacturing integration should have been elaborated and formally set forth as the reason for its purchase by the Federal Company of the Carnegie Company would not, in the nature of things, be done. Everyone concerned knew these facts without their being stated. It was a thing every steel man recognized so fully that no specific reference would be naturally made to it. But the proofs do show that, whatever purpose was in the minds of those forming the steel company, integration was certainly one of the special objects in view. Thus, Mr. Schwab (volume 11, p. 4139) makes it clear that "the economic advantages to be derived" were more enlarged upon even than foreign trade. "I [138] might say," is his testimony, "that I enlarged, and perhaps made a more strenuous talk to Mr. Morgan, upon the subject of export and our ability to export, and foreign business in foreign markets, than any other, excepting only the economic advantages to be derived." That "the ability to export" and "the economic advantages to be derived," thus enlarged upon, was integration, is shown in Mr. Schwab's testimony:

"With reference to the foreign situation, I pointed out to him that up to that time our business, the steel business in general, had been nominal with reference to export business, and that, in my opinion, it could only be made profitable and possible by such an organization; that no company selling an individual line, a single line, or one or two lines, could hope to successfully compete for foreign business, where they were not prepared to furnish the customer every line that he might

require for a structure or business; and that half a dozen or a dozen individual companies could not afford the expense or the organization to secure the talent necessary to make a successful export business, while such a company as I outlined could."

That this plan of integration in varied products—and nothing in excess of the required integration—was carried out is also shown by the proofs. In that regard, the same witness, speaking of his visit later to Mr. Morgan, when he took him the figures at which Mr. Carnegie would sell, testified:

"Q. Did you have any further talk with him at that time that you can recall?—A. We had quite some talk upon the general subjects outlined before, and I was consulted with reference to the other concerns. I had nothing to do with the negotiations for the other concerns.

"Q. Who consulted you? Mr. Morgan?—A. Yes; Mr. Morgan and Mr. Bacon.

"Q. Asking questions about what?—A. A great many questions relative to the other concerns, the various concerns.

"Q. As to their character and business?—A. As to their character and business, and what changes would be made, and how they would be operated, etc.

"Q. Was there in any of that conversation any question of obtaining all the steel plants, or acquiring a monopoly, or anything of that kind? * * *—A. There was considerable discussion about the acquisition of other plants. I advised Mr. Morgan against it, because the other plants added nothing to the efficiency of the one I proposed. For example, plants like Jones & Laughlin, the Pennsylvania Steel Company, the Cambria, were discussed; but I said, 'No; they are in practically the same lines as the Carnegie Company, and they add no efficiency to this organization.'

"Q. At this time did the Federal have finishing mills?—A. They did.

"Q. A sufficient number of them?—A. They had a sufficient number in their own lines.

"Q. What were they lacking?—A. The Federal did not make tubes; they did not make sheets; they did not make plates to any extent, and among the things needed there were few that the Carnegie Company made, other than rails, that the Federal Company made; and as to the Tube Company, the Carnegie at that time did not make tubes, nor did they make wire, which the Wire Company made. Indeed, the addition of these plants, the general whole, was the addition of the lines that the Carnegie or the Federal did not have.

"Q. Did either the Carnegie or the Federal have a complete line of finishing mills?—A. No steel company had.

"Q. None of them had?—A. None of them had, not nearly a complete line.

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[129] "Q. Which companies were there that you talked about as being capable of making up a complete line?—A. There was the Carnegie and the Federal and the National; and then there was the Wire, the Tube, the Bridge, and the Sheet, and the Hoop Company, all of whom made their individual lines, and the Tin Plate Company also; I overlooked them.

"Q. As to the business of these companies—where was the business of the Federal principally done?—A. Mostly in the Middle West.

"Q. And the Carnegie?—A. When I say the Middle West, I mean Chicago and west. The Carnegie, from Chicago east.

* * * * * * *

"A. They made rails. They made blooms and billets. You asked what they made in common. They made blooms and billets that were supplied to other finishing companies, which they did not finish themselves. Then the Carnegie Company made a few, a very small percentage of, merchant bars, and so did the Federal Steel Company.

"Q. In what territories, respectively, did they sell their products chiefly?—A. As I said, the Federal sold mostly in a circle of which Chicago would be the center. The Carnegie sold theirs in a circle of which Pittsburgh would be the center.

"Q. What was the difficulty in trading over an extensive territory?—A. If the Carnegie shipped west of Chicago, of course, they made a very great sacrifice in freights; and if the Federal shipped east of Pittsburgh, of course, they made a very great sacrifice in freights."

It will thus be seen that here was a complete outline of a manufacturing plan which, if carried out, enabled the Federal Company to integrate from or to varied finished products, and this not only in the Chicago district, but, through the acquisition of the Carnegie Company, through the Pittsburgh district as well, and through this latter district to reach the foreign markets, which it was powerless to reach from its own district, and through acquisition of the finishing mills held by the Tube, the Sheet, the Wire, and Bridge Companies to obtain the varied product facilities by which alone successful foreign trade could be built up. The testimony of Robert Bacon also shows that the whole plan turned on the possibility and advisability of the Federal buying the Carnegie Company, and, if that could be effected, that certain other units should be bought to provide adequate finishing plants. Thus, referring to a meeting of the Federal directors held to consider the offer Mr. Carnegie made, Mr. Bacon (volume 14, p. 5479) testified:

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"Q. Were any steps taken to get the views of the other Federal directors that day or later?—A. Yes. We succeeded in getting them in New York the next morning, with the exception of Mr. Marshall Field, with whom we communicated over the long-distance telephone; so that the next day we had, I believe, the opinion of all the Federal directors.

"Q. How long did they remain together on Monday, the Federal directors I mean, whom you assembled?—A. Nearly all day, at different times.

"Q. Was a conclusion reached that day with reference to the Carnegie offer—I mean, as to whether it was wise to accept it or not?—A. My recollection is that, although it was very difficult to persuade some of the gentlemen, a conclusion was reached in principle in the afternoon.

"Q. Was there any discussion that day as to how the thing might be financed?—A. No discussion as to detail.

[140] "Q. I do not mean detail at all.—A. But naturally the supposition was that it would be financed by J. P. Morgan & Co.

"Q. Do you remember whether Mr. Morgan said anything on that subject to his associate directors, as to whether he was willing to undertake it, I mean?—A. Yes; my recollection is that in a very few words Mr. Morgan finally, after having heard our opinions, said that if they approved and substantiated the estimates in a general way of the business, and its probable success, that he would undertake to finance it.

"Q. Was there any talk that day as to what, if any, other concerns should be taken over?—A. Yes; it was believed by all the men present, the directors of the Federal Steel Company, that if the Carnegie was purchased, other units should be purchased as well.

"Q. And were the other units talked of and considered?—A. Yes; they were all considered.

"Q. And upon what principle were they chosen?—A. Upon what principle were they chosen? I should say upon the principle of furnishing each an essential part of a completed whole; a new company which should manufacture all kinds of iron and steel products, owning its raw materials, facilities for transportation of raw materials to the mills and finishing plants, I think that was the basis upon which each one of these elements was considered, and, of course, the price at which they could be acquired, based upon their actual value.

"Q. Was any arrangement made on that day or shortly thereafter for opening negotiations with the owners of the various plants that were talked of?—A. Yes; I think it was determined that day to go right ahead and see if they could be bought upon a satisfactory basis.

"Q. Who was intrusted with the negotiations—if you remember?—A. I think that J. P. Morgan & Co. bore the brunt of it.

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"Q. What was said by the gentlemen present with respect to the objects to be attained by the organization? * * *—A. It was said by all those gentlemen present, and I knew it to be their opinion, having been so closely associated with them for many years, that the object to be attained was the creation of a great new steel company, based upon the Federal Steel Company, which would be able, by the ownership of its raw materials, by all legitimate means of rail and lake transportation, and by the ownership of finishing mills of all descriptions both in the East and West to create a plant which should be able to manufacture every kind of iron and steel, and by reason largely of its ability to reduce the cost of production and the territorial distribution of its plants and activities, sell its products to the best advantage in every market in the world. I know that to be the object of those men that formed the United States Steel Corporation.

* * * * * * *

"A. Mr. Morgan believed that if he could take part in the formation of such a company it would be the greatest, the crowning, achievement of his business career. He believed that the effect of such a creation would be upon the whole industrial fabric, the industrial life of this country, of tremendous beneficial effect. Convinced as he was by Brother Schwab and the other experts that almost inconceivable results could be obtained in the way of lowering cost of production of iron and steel, that such a company would bring more good into our whole national life, constituting as it did the greatest single factor in the great constructive work of the country, than could possibly be attained in any other way. His first great object was, as I have said, by reason of the decrease in cost of production, to make it possible to so improve the conditions of labor by increasing wages and bettering the conditions, and, by enabling the consumer always to depend upon stability of prices, to bring about a new condition of things. Those briefly, were the ideals and ambitions of Mr. Morgan in forming the United States Steel Company.

* * * * * * *

[141] "It was said by all those gentlemen present—I believe all of them; I know by Mr. Morgan—that under no considerations would he take part in anything which was or might be considered to be a monopoly or any attempt to restrain competition. I know that that was one thing farthest from his willingness to participate in."

Referring to this meeting Judge Gary (volume 12, pp. 4732, 4733), says:

"Q. Now, what were the subjects considered by you, gentlemen, directors of the Federal, or owners of the Federal, at that time, and on account of which, or after considering which, you reached the resolution you mention?—A. The question of securing the Carnegie properties with their ore reserves, which contained a class and

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character of ore in large quantities which the Federal or the Minnesota iron did not have, particularly their mills for diversified products, their location, and their organization, which was believed to be a very good one, and, if possible, the acquisition of other companies owning finishing mills, in order to diversify the product, including the Wire Company, which had been offered to us a number of times, and for the purpose, as I have said, of completing a rounded-out proposition for the development of the business, extension of the business, manufacturing at lowest cost, and, particularly, increasing the extent of export business."

And (volume 12, p. 4751) he adds:

"You see, in this whole plan, Mr. Lindabury, there was an effort made to acquire property that would be useful to each other, and by that I mean to acquire a plant that furnished certain commodities to another plant which we were acquiring and to acquire—the latter because it could, at good advantage, secure the products which it needed for its uses, and so all through the line, from the ore down to the conversion from one product into another and the final distribution of the finished product."

These proofs certainly tend to show that the practical manufacturing question of rounding out or integrating the Federal Company by acquiring finishing companies was one of the objects its directors had in view at this meeting. The proofs also show that these several finishing mills were consumers of such basic products as were made by the Federal and the Carnegie, and that those two companies had no such finishing mills of their own as was adequate to consume the product they made, which was suitable for such mill. Without entering into the details of the proof bearing on these several finishing companies, all of which, together with the comments thereon are to be found in the Statement of the Case, page 63 and following, we may say they fairly show that without the acquisition of each of the finishing companies named, viz., the American Steel & Wire, the National Tube, the American Bridge, the American Steel Hoop, and the American Sheet Steel, the Federal Steel Company, even with the acquisition of the Carnegie would not have been provided with adequate finishing facilities for consuming its sub-basic product. And further, without the acquisition of the first three, the Federal would lack several of the most important products (Defendant's Exhibit, volume 2,

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p. 204) that have entered into the foreign trade built up by the United States Steel Products Company. It will also be noted that, in addition to the affirmative testimony quoted above tending to show that integration along manufacturing lines and development of foreign trade were among the avowed purposes of those who formed the Steel Corporation, there is a negative testimony of those who took part in forming the Steel Corpora[142]tion, and quoted below, that monopoly of the steel and iron business was not the purpose for which that corporation was formed.

First. That with the competition left outside of the Steel Company, the extent of which has already been shown, a monopoly of the steel and iron business of the United States was simply impossible, and that no effort was made to secure these companies (volume 12, pp. 4756, 4757).

Second. That in view of the fact that the proportionate volume of competitive business has increased since the Steel Company was formed and that the proofs show no attempt by it to monopolize it to the exclusion of its competitors, to now attribute to those who formed the corporation an intended monopolization would be to say that, having formed the corporation for the purpose of monopoly, they immediately abandoned such purpose and made no effort to accomplish it.

Third. That the publicity, which the proofs (volume 14, pp. 5669, 5585) show the Steel Company has from time to time made of its prices, its accounts, and its policies, would seem a practice in line with legitimate business, rather than with illegal monopolization.

Fourth. That in carrying out the plan the advice of Abraham S. Hewitt was (volume 14, p. 5384) taken by Mr. Morgan, and at the latter's request Mr. Hewitt went on the board and served until his death, is a fact which, in view of the high character of Abraham S. Hewitt, tends to negative the contention that the purpose in view was to violate the law.

And lastly, as stated above, there is affirmative testimony that no such object was in view. In that regard the testimony of Robert Bacon (volume 14, pp. 5485-5487) is not to be overlooked. His service as Secretary of State under

one administration, as Minister to France under another, coupled with his selection on his retirement from business to positions of educational character, warrant this court in attributing weight to his testimony. The testimony of Judge James H. Reed (volume 14, p. 5663), of Judge Gary (volume 12, pp. 4753-4755), and of Charles M. Schwab is to the same effect. The latter (volume 11, p. 4175) says:

"From the moment when I first started with Mr. Morgan, the question of our gaining a monopoly or in any way controlling the steel industry was never mentioned. My whole argument with him, as advocating this company, was the economic development of the same, and the matter, to the best of my knowledge, never came up thereafter."

And in this connection it is to be noted that the proofs show that the Carnegie Company and the finishing companies which the Steel Company acquired in 1901 were formed at various times from 1898 to 1900, that (volume 12, p. 5754) these particular companies (volume 28, p. 11759) were made the subject of congressional investigation, that no steps were taken by the Government to dissolve such companies for the 13 years following the formation of the earliest of these companies, and 11 years from the latest, until 1911, that the Steel Company was also in 1905 made the subject of further congressional investigation, and that no steps were taken to dissolve it until this bill was filed.

Recurring, therefore, to the particular question with which this particular part of his opinion deals, namely, whether we should now enter [143] a decree dissolving the Steel Corporation on the ground of its inherent illegal character in 1901, and whether we should also dissolve the several constituent companies which it acquired on the like ground of their original inherent illegal character when they were formed, we think there is ground for our holding, in view of the facts, proofs, and views above set forth, that we are not, as a court of equity, warranted in taking such a drastic course as to now decree the dissolution of the Steel Corporation or its constituent companies.

We are, however, pointed to the subsequent acquisition by the Steel Company of several properties as being attempted monopoly or restraint of trade, and as evidencing an original

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purpose to monopolize and restrain. The first of such was in August, 1901, when the Steel Company bought the Shelby Steel Tube Company. Whatever may have been its motive at the outset, it is clear the purchase effected neither monopoly nor restraint of trade, for we have already seen that while, even with the acquisition of this company, the Steel Company's output of seamless tube, during the ten years of its existence, has doubled, during the same period its competitors' sales have grown sevenfold. In the light of such figures and facts, we are of opinion that the acquisition was simply in the due course of normal business, and, indeed, was but the virtual carrying out of integration plans of the Carnegie Steel Company that long antedated the formation of the Steel Company. Without entering into minor details, we may say that no proof of monopoly or trade restraint was shown beyond the conceded fact of purchase, and the fact that the new article of seamless tubing was in some uses supplanting lap-weld. We have examined, among others, the testimony found in Government Exhibits, volume 2, pp. 405, 411, 560, 562; Government Exhibit, volume 14, pp. 2902, 2823; volume 11, pp. 4198, 4199; volume 13, pp. 5237–5260; volume 17, p. 7940; volume 13, pp. 5076–5089; volume 12, p. 4808; volume 13, p. 4986; *Delaware* v. *Shelby*, 160 Fed. 928, 88 C. C. A. 110; *Shelby* v. *Delaware* (C. C.), 151 Fed. 64; *Delaware* v. *Shelby*, 212 U. S. 580, 29 Sup. Ct. 689, 53 L. Ed. 659; and Defendants' Exhibit No. 31, volume 1, p. 166—and therefrom, without entering into details we deduce these conclusions. The old type of tubing was called "lap-weld," and made by the National Tube Company. The Shelby Company made a different article, called "seamless" tube. While in some ways lap-weld and seamless were in competition, yet their main uses (volume 13, p. 5803) were not the same. The Shelby Company held a basic patent involving the piercing, at an early stage, of the billet from which the seamless tube was drawn. Before the purchase of the Carnegie Steel Company by the United States Steel Corporation, the former company, in pursuance of its purpose to enter the pipe business, was carrying on some experimental work in seamless tube making at the Shelby Company's plants, and its man-

agement had become convinced that the Shelby method was the proper one. Meanwhile the National Company had also determined to enter the seamless tube field, and to that end had bought the Standard Company. The latter made seamless tube under a patent granted to two former employés of the Shelby Company. Its business in the seamless tubes was (volume 13, p. 5083) very small, and it had (volume 19, p. 7940) previ[144]ously tried to consolidate with the Shelby Company. Much patent litigation had resulted, the National Company carrying on the contest for the Standard Company.

When the Steel Company was formed, two divergent views were thus presented by the managements of two of its units. The National Tube, represented by Mr. Converse (volume 13, pp. 5243, 5244), contended the Standard's process and machinery was the proper mode of seamless tube making. The Carnegie Company, represented by its president, contended the Shelby method was the proper one. The determination of the matter seems to have been made by two directors of the Steel Company who had taken no part in the contest between the National Tube Company and the Carnegie Steel Company. Their testimony (volume 13, p. 4936, and volume 12, p. 4803) is that they became convinced that the patent of the Shelby Company controlled the situation. That company would only sell its patent, however (volume 12, p. 4805), if the Steel Company also bought its plant. Such purchase the Steel Company made in order to get the patent. In view of the fact that the Shelby patent has been sustained by the courts, that the Steel Company on its purchase abandoned the machinery used by the Standard Company, and has since manufactured under the Shelby process, we are satisfied that the acquisition of that company was an ordinary purchase, and had no other purpose than to acquire and use the legal monopoly which the Shelby Company had obtained from the Government by its patent. And a purpose to restrain and monopolize the pipe business is negatived by the fact that no monopoly has resulted and that pipe (volume 11, p. 4481) sells for $20 a ton less than when the Steel Company was formed.

The next matter in the line of alleged monopoly and trade restraint was the purchase by the Steel Corporation of the

Union Steel Company in December, 1902. The testimony bearing on that question on the part of the Government will be found at volume 3, pp. 1086 to 1137; volume 5, pp. 1997 to 2009; volume 6, pp. 2141 to 2218; Government Exhibit, volume 4, pp. 1574, 1583; volume 5, p. 1883; and on the part of the Steel Company in volume 14, p. 5666; volume 12, pp. 4806 to 4810; volume 10, pp. 4037 and 4038. Without here discussing the testimony on the part of the Steel Company, we may say that the proof on the part of the Government in itself shows that this sale was not made with any purpose of monopoly or trade restraint. The Union Steel Company had merged with the Sharon Steel Company. John Stevenson, jr., who was the practical man in the Sharon Company, testified that such competition as there was between those companies and the defendant Steel Company was fair:

> "I liked the competition. If you are bound to have competition, theirs was good competition."

He said he sold out his interest in the Union Company because he needed the money; that he had put more money into the enterprise than he owned and was hard up; that the effort to sell came from his company; that the sale was made on fair terms, cost and accrued profit. Their ore holdings were very valuable, had been definitely ascertained by spot borings, were owned in fee, and were sold in place at a price [145] based on the common ore royalty. He says that at the time of the sale the Union was only one of a number of competitors, all of whom were flourishing and doing an increased business, such as the Pennsylvania, Cambria, Bethlehem, Lackawanna, the Republic, and Jones & Laughlin. That his company's business with relation to the country's total production was less than 2 per cent, and that the Steel Company's percentage has decreased, and its competitors' percentage had increased during that time. The testimony of Mr. Whitla, one of Stevenson's associates, is to the same effect, namely, that the competition of the Steel Company was fair, and that the business of the Union Company had grown to such an extent as to interfere with his own and some of his associates; that the sale was made at a fair price when the opportunity came to withdraw.

To the same effect is the testimony of W. H. Donner. He started the Union Steel Company, was its practical man, and after the sale re-entered the steel business as president of the Cambria Steel Company, one of the principal competitors of the Steel Company. He says the Union Company, after its merger with the Sharon, had large ore reserves of very desirable quality; that they had valuable lake frontage harbor lands, and fine coking coal reserves; that they had large open-hearth facilities (volume 12, p. 4806) in which the Carnegie Company was short; that they also had finishing mills in which the American Steel & Wire Company were short and which it needed (volume 12, p. 4807; volume 10, p. 4037) in foreign trade; that these finishing mills were adapted to using Bessemer steel with which the Carnegie Company was oversupplied; that the Carnegie Company (the Steel Company's subsidiary) had an over-capacity of Bessemer and an under-capacity of open hearth is conclusively shown by the subsequent integration of the Steel Corporation at Braddock (in the same district as the Union), where $11,000,000 was required in open hearth extensions. In that regard the proof (Farrell, volume 10, p. 4077) is:

"We are building at Pittsburgh a new steel works, a rail mill at Braddock, Pa., with a capacity of 750,000 tons a year of open-hearth steel; that is, to take up the rail business. This Bessemer equipment is obsolete; that is, the equipment is just as good as new, but the demand does not exist, so consequently we cannot employ it, and it necessitates producing steel that is required by the buyers. We are spending there about $11,000,000."

Donner says the movement to sell came from the Union Company, and not from the Steel Company; that he knows the Steel Corporation people were at first opposed to buying, and only changed their minds when shown how the Union would supply, as above stated, the features in which the former were short; that, in order to induce the Steel Corporation to buy, the Union Company was obliged to cut down their ore prices $1,500,000 below what these properties had been valued at when his company and the Sharon merged; that of the four men in the original Union Company he was in favor of selling in order to get out of debt,

one of his associates was very anxious to sell, and in fact brought about the sale, because he was in an embarrassing position, because his connection with both the Union Company and the Steel Company prevented him from taking part in the affairs of either; that his other two partners were opposed to selling, and only acceded [146] to it on account of their personal relations to the partner who desired the sale. Without here detailing the defendant's testimony at length, which we may say corroborates the foregoing, we are of opinion that the purchase of the Union Company was a natural and normal acquisition, incident to the growth, increase, and needs of the Steel Corporation's business, and was not done with a view to monopolizing the steel business, or to restrain trade by eliminating competition. And we may say that this conclusion is in accord with the subsequent acts of the Steel Corporation. The proofs show (volume 10, p. 4037) that some $2,225,000 was spent by the Steel Company to further increase the Union wire plants and meet the needs of the company's foreign business. The whole wire capacity of the Union's wire plants (volume 10, p. 3845) is now being operated to the capacity of 83,000 tons of wire for foreign trade against 8,000 tons when it was bought. In connection with the work of these finishing mills, about a million and a half dollars were spent in open-hearth construction by which the finishing mills and furnaces—blast and open-hearth—were integrated into a continuous process. Indeed, the need of this plant to carry out the general unification problem of the Steel Company is shown by the fact (Donner, volume 6, p. 2185) that subsequent to its purchase of the Union Steel Company the Steel Corporation spent near $7,000,000 in extensions in view by the Union, and $10,000,000 in extensions planned after the purchase.

We next turn to the acquisition in May, 1904, of the Clairton Steel Company. The Crucible Steel Company was engaged in the manufacture of tool and finer grades of steel (volume 13, p. 4953), which the Steel Corporation did not make. In the spirit of complete integration which swept over the steel trade, the Crucible Company, as the sequel

clearly shows, had in 1902, mistakenly through the Clairton Company, whose stock it owned, gone into ore ownership, furnace, open-hearth, bloom, billet, and slab integration on a scale far beyond its own requirements. In January, 1904, the Clairton Company had become insolvent and passed (volume 5, p. 2059; volume 14, p. 5669) into the hands of a receiver. The proofs (Government Exhibit, volume 2, p. 599; volume 14, p. 5587; volume 12, p. 4814; volume 13, p. 5236) show that several efforts had previously been made by the Crucible Steel Company to sell the Clairton Company to the Steel Corporation. That company declined to purchase. After the receivership, the negotiations were resumed with it and other interests (volume 5, p. 2061), and the property sold to the Steel Corporation with the permission (volume 5, p. 2061) of the court at $4,000,000 below cost. Clairton had a pig-iron capacity of some 420,000 tons. It had (volume 12, p. 4814, and volume 13, p. 5236) through its type of furnace construction been able for the first time to make pig iron from Mesaba ores without any mixture of old range ores. In connection with this sale, it should here be stated, as a matter of which this court cannot but take judicial notice, that the receivership of the Clairton Company and the sale of its property was under the direction of one of the judges now sitting in this case; that the bonds of the insolvent company were guaranteed by the Crucible Company; that, while the latter company was and has since [147] been prosperous, the guaranty by it of the Clairton Company's bonds seriously threatened not only the stockholders of the Crucible Company, as testified in this case (volume 14, p. 5669), but grave financial troubles in the community. To avoid these, the receivers, under the direction of the court, and in coöperation with the officers of the Crucible Company, sought to have the Steel Company buy this plant and thus relieve the Crucible Company of its large and threatening collateral liability.

The next of these acquisitions by the Steel Company, which it is alleged was made to monopolize or restrain trade, is known as the Great Northern ore lease, which was a lease on royalty of some thirty-nine thousand acres of Lake Superior ore lands in August, 1907. This lease

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provided for the payment of a minimum royalty of 750,000 tons to be mined in 1907, 1,500,000 tons in 1908, and an increase of 750,000 tons each year until 8,250,000 tons was reached in 1917. That yearly amount was then to be taken out until the lease ended in 50 years. The royalty was, using round figures, \$1.17 per ton on 49 per cent ore, \$1.21 on 50 per cent, and \$1.98 on 66 per cent ore, with an increase of 3.4 cents per each year on all grades. The lease provided the Steel Company had the option to cancel it as of January 1, 1915. During that time the lessee had full rights to test the premises. In pursuance of such right of cancellation, the Steel Corporation early in 1911, and prior to the filing of this petition, gave notice of cancellation, in pursuance of which the lease was subsequently surrendered. It will thus appear that, whatever effect the leasing and continued control of this ore on the fact of the monopolization of ore reserves may originally have had, the surrender of the lease lessened the ore holdings of the company to a point far below any possibility of monopolization. A discussion by us of the question of the possible effect of this lease as giving monopolistic control would be problematical, and the uncertain character of any conclusion reached is best emphasized by the essentially different status of the ore business now and when this lease was made. This is due to the subsequent development of other fields and to the fact that ores which a few years ago were looked upon as not usable can now be used under new methods. Moreover, the facts cited in the former part of this opinion, in reference to the ore supplies of the competitors of the Steel Corporation, show not only that several of the large companies had a reserve for more years than the Steel Company, that the seaboard companies are wholly independent of the Lake Superior regions, and that the Steel Corporation's competitors have from time to time been able to acquire all additional ore reserves desired. In addition to this, we have the fact of large holdings by mining companies who sell ore and who have been compelled (volume 16, pp. 6543 and 6544) to integrate into blast furnaces in order to dispose of it. The proofs of experienced witnesses (volume 16, p. 6232; volume 17, p.

7012) are that adequate ore reserves could be had by new companies. In view of these facts and proofs, and of the fact that the option to cancel the ore lease here in question had been exercised when the present petition was filed, it would seem that the ore reserve of the Steel Corporation held at that time gave it no monopoly in ore. Such being the [148] case, the ore lands in question having reverted to the owners, they and such defendants as were made parties to this cause by virtue of their relation to the acquisition of such ore lands appear to have no further part in this cause. So far as they are concerned, the petition will be dismissed.

We shall next consider the purchase by the Steel Company of the Tennessee Coal & Iron Company which was made in November, 1907. On the one hand, it is alleged the Tennessee Company was a competitor of great power and that its purchase was for the purpose of suppressing competition and effecting monopoly and restraint of trade. On the other hand, it is contended that the competition of the Tennessee Company was of relatively small extent, that its purchase was practically forced upon the Steel Company as a means of averting a threatening financial crisis during the panic of 1907, and that such purchase neither did, nor tended to, monopolize or restrain the steel and iron industry of the United States. Without here entering upon a detailed analysis of all the proofs, we may say that we have specially studied, in addition to other proofs, the evidence produced by the Government and found at Buell, volume 1, pp. 15 to 34; Topping, volume 2, pp. 643–671 and 686–718; Perin, volume 2, pp. 792–982; Same, volume 3, pp. 983–997, also 1005–1008, also 1016–1019, also 1024, 1025; Gov't Exhibit No. 90, vol. 1, p. 242; Gov't Exhibit, vol. 2, pp. 488, 493, 510, 544; Corey, volume 8, pp. 2973–2975; Alos, pp. 3045–3056; Grasty, volume 8, pp. 3140, 3153; Gov't Exhibit No. 341, vol. 8, p. 2132 (in that connection see Topping, volume 2, pp. 706, 709, 712, 714, 716, 755); also, Gov't Exhibit, vol. 2, pp. 488, 492, 510; and also the testimony produced by the Steel Company, to wit, Filbert, volume 14, pp. 5591–5593; Farrell, volume 10, pp. 4018, 4020, 4021, 4024, 4028; Witherbee, volume 18, pp.

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7287–7290; Bowron, volume 25, pp. 10415, 10431, 10440, 10442; also, volume 20, p. 10408; Crawford, volume 13, pp. 6125–6178; Burr, volume 27, pp. 11573–11586; King, volume 25, pp. 10249–10260; Haas, volume 20, p. 8316; Farrell, volume 10, p. 3881; Defendant's Exhibit No. 12, vol. 1, p. 138—bearing on the question of monopoly and trade restraint as contended for by the Government, and have arrived at the following conclusions: At the time the Steel Company bought the Tennessee Company, the latter's production of iron and steel was 1.7 per cent of the production of the country. That up to that time the Tennessee Company had not been a business success. That it was making rails, which was its principal steel product, at a loss. That its ultimate success was problematic. That such success involved an outlay of upwards of $25,000,000 to put it on a dividend basis. That it had never really earned any dividends up to the time of its sale. That the whole testimony shows its relation as a successful, substantial competitor with the Steel Company in the volume of its business, the character of its product, and the breadth of its market was negligible. We are warranted by this testimony, and find the fact to be, that its purchase by the Steel Company in no way tended to monopolize the steel and iron trade, and that it was not bought with the purpose or intent of monopolizing, or attempting to monopolize or restrain, that trade. Such negative conclusions and findings are con[149]firmed by the affirmative proofs showing just how the purchase was made, namely, as a necessary part of comprehensive plans of bankers and business men, sanctioned by President Roosevelt to check the panic of 1907, which was then at its height. Without entering into details, we may say the situation was summed up in the letter of President Roosevelt to Attorney General Bonaparte, found in Gov't Exhibit No. 339, vol. 7, p. 2125, as follows:

"November 4th, 1907.

"My Dear Attorney General: Judge E. H. Gary and Mr. H. C. Frick on behalf of the Steel Corporation have just called upon me. They state that there is a certain business firm (the name of which I have not been told, but which is of real importance in New York business circles) which will undoubtedly fail this week if help is not

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given. Among its assets are a majority of the securities of the Tennessee Coal Company. Application has been urgently made to the Steel Corporation to purchase this stock as the only means of avoiding a failure. Judge Gary and Mr. Frick inform me that as a mere business transaction they do not care to purchase the stock; that under ordinary circumstances, they would not consider purchasing the stock because but little benefit will come to the Steel Corporation from the purchase; that they are aware that the purchase will be used as a handle for attack upon them on the ground that they are striving to secure a monopoly of the business and prevent competition—not that this would represent what could honestly be said, but what might recklessly and untruthfully be said. They further inform me that as a matter of fact the policy of the company has been to decline to acquire more than 60 per cent of the steel properties and that this purpose has been persevered in for several years past, with the object of preventing these accusations, and as a matter of fact, their proportion of steel properties has slightly decreased, so that it is below this 60 per cent and the acquisition of the property in question will not raise it above 60 per cent. But they feel that it is immensely to their interest, as to the interest of every responsible business man to try to prevent a panic and a general industrial smash-up at this time, and that they are willing to go into this transaction, which they would not otherwise go into, because it seems the opinion of those best fitted to express judgment in New York that it will be an important factor in preventing a break that might be ruinous; and that this has been urged upon them by the combination of the most responsible bankers in New York who are now thus engaged in endeavoring to save the situation. But they asserted they did not wish to do this, if I stated that it ought not to be done. I answered that while of course I could not advise them to take the action proposed, I felt it no public duty of mine to interpose any objection.

"Sincerely yours, THEODORE ROOSEVELT."

When called by the Government as a witness, President Roosevelt (volume 8, pp. 2903–2908) testified as to this letter as follows:

"I was dealing with a panic, and a situation where not mere merely twenty-four hours, but one hour, might cause widespread disaster to the public. * * *

"I ought to say that from New York I had been told by banker after banker that the Tennessee Coal & Iron Securities were valueless as securities that counted in that panic. * * *

"There were two matters to which my attention was especially directed. One was the condition of things in New York; the relief that the action would bring, not merely to New York, but throughout the entire country—just as much in Louisiana and Minnesota and California as in New York. That was one thing. The other thing to

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which my attention was particularly directed was the percentage of holdings that the Steel Corporation had and had had and would have after the Tennessee Coal & Iron properties were acquired. * * *

"The knowledge that I had was that the Steel Corporation had some years previously possessed nearly 60 per cent of the holdings of the steel industry in the country; that its percentage had shrunk steadily; that the addition of [150] the Tennessee Coal & Iron Company, which was something in the nature of 4 per cent, somewhere between 2 and 4 per cent, I have forgotten the exact amount, somewhere around there, did not bring up the percentage of holdings of the Steel Corporation to what it had been a few years previously. * * *

"My knowledge was simply this, that it was a matter of general opinion among experts that the Tennessee Coal & Iron people had a property which was almost worthless in their hands, nearly worthless to them, nearly worthless to the communities in which it was situated, and entirely worthless to any financial institution that had the securities the minute that any panic came, and that the only way to give value to it was to put it in the hands of people, whose possession of it would be a guaranty that there was value to it. * * *

"I believed at the time that the facts in the case were as represented to me on behalf of the Steel Corporation, and my further knowledge has convinced me that this was true. I believed at the time that the representatives of the Steel Corporation told me the truth as to the change that would be worked in the percentage of the business which the proposed acquisition would give the Steel Corporation, and further inquiry has confirmed me that they did so. I was not misled. The representatives of the Steel Corporation told me the truth as to what the effect of the action at that time would be, and any statement that I was misled, or that the representatives of the Steel Corporation did not thus tell me the truth as to the facts of the case, is itself not in accordance with the truth."

An examination of the testimony, viz., letter of the Attorney General of the United States of November 4th, cited by the President, volume 8, p. 2907; Gary, volume 12, pp. 4834–4866; Tierney, volume 4, pp. 1559–1587; Thorne, volume 3, p. 1276; Topping, volume 2, p. 695; Corey, volume 8, pp. 3052, 3054; Gayley, volume 9, p. 3618; Ledyard, volume 15, pp. 6065–6114—shows that the matter was as stated by the President, and that the Steel Corporation's chairman absolutely refused to purchase (volume 12, p. 4854), unless the matter was submitted to the Government authorities, his testimony in that regard being:

"While the President of the United States could not say that we might purchase this, or that we should not purchase this property,

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yet, I believed, inasmuch as he had the general direction of the law department of the United States, certainly we ought to know what would be the attitude of the administration in case we did buy this property."

Indeed, as to this purchase, as well as the others, which we have discussed above, sales made under different circumstances and for various reasons, we cannot but feel, in the light of the proofs, that they were made in fair business course, and were, to use the language of the Supreme Court in the Standard Oil Case, "the honest exertion of one's right to contract for his own benefit, unaccompanied by a wrongful motive to injure others."

It is strongly urged that the fact that standard Bessemer steel rails have for a long series of years, covering indeed the whole life of the Steel Corporation, been sold at the uniform price of $28 per ton, shows some controlling influence and, in connection with the proofs, evidences the existence of a combination among all rail mills, including the Steel Corporation, to control the price. Generally speaking, railroad rails are as to their basic character either Bessemer or open-hearth. Bessemer was the earlier development, and of this type is the standard Bessemer rail which has kept the above uniform price. The proofs show (volume 10, p. 4049) that about 30 [151] per cent of the rails sold are of this kind, the consumption having fallen (Defendant's Exhibit, volume 3, pp. 323, 324) from 99.9 per cent in 1901 to 33 per cent in 1912. As we have said, the proofs show that these standard Bessemer rails have been almost uniformly sold at $28, though there is some proof (volume 26, p. 10942) that they were at times sold for less. The open-hearth rail is a later development; it has largely superseded the standard Bessemer, constituting (volume 10, p. 4051) 60 per cent of the rail product. It ordinarily sells (volume 10, pp. 4960, 4050) at from $1.50 to $2 per gross ton higher than the Bessemer standard rails, and the price of such open-hearth rails (volume 13, p. 4961) according to specifications. This is so (volume 10, p. 4050) "because many open-hearth rails are made to special analyses, the chemical composition is different, due to the fact that some railroads insist upon greater

physical tests than others, which, of course, while the open-hearth process is the basic operation, nevertheless we call them different qualities of rails." The other 10 per cent of rails consist of alloy or electric rails, the cost of making which (volume 10, p. 4051) is $40 per ton; nickel alloy rails, which vary (volume 10, p. 4051) from $34 to $60 per ton; and manganese, which sell for from $100 to $130 per ton, depending upon chemical analyses, they being especially made to serve for work on curves, under the shade of bridges, and other such trying places. It will thus be seen there is a wide variation in the character and price of the great bulk, namely, of 70 per cent of the country's rail product, and that the standard Bessemer rails which it is alleged evidenced price control are in fact but 30 per cent of the total rail consumption. The testimony (volume 13, p. 4959) throws some light on the uniform price of this remaining 30 per cent of the standard Bessemer rails, namely, that $28 a ton is a foundation price from which the price of other rails, varying in specification and chemical requirements, can be figured. Another cause of price uniformity in rails, the proof (volume 13, p. 4960) shows is due to the change about 1900 in reference to freights; prior to 1900 there was an opportunity to bargain for transportation which was at no definite fixed price. Since 1900, by Government regulation, railroads can no longer trade in transportation at varying figures. The extent to which special freight rates entered in the sale of rails prior to 1900 is illustrated by the incidents elsewhere referred to, where the proofs (volume 10, p. 3882) show that a special freight rate of 45 cents led to sales of rails being made from Chicago to Japan. The proofs also show that the real potential control over the price of rails is rather in the buyers than the makers of rails. Reflection will show why this is so. Freight rebating being out of the question, the price of a rail becomes purely a manufacturing question. A railroad is not compelled to buy its rails at once. It can defer its purchases, and the proof is that, when a large railroad like the Pennsylvania (volume 13, p. 4958) or the New York Central (volume 12, p. 4910) gives an initial order to one rail company that sets the price of rails

for other rail companies. At the argument of this case, in response to inquiries by the court, [152] it was stated that the Pennsylvania Railroad was a large stockholder in the Pennsylvania Steel Company, to which company reference was made in the first part of this opinion. Such being the case, it would seem as a business proposition that that road would be quite independent of any exaction in rail prices, and the fact and significance of this independence may be well connected with the proof that in the previous era of destructive rail price cutting, there had been by means of such price cutting an intent to drive the Pennsylvania out of business, and that company had been forced into a receivership. But whatever may have been the rail pool practices prior to the formation of the Steel Corporation, and in the earlier years following its formation to restrain or obstruct the rail trade, the proof in this case shows that in 1900 a new method of rail buying was begun, and was for some years prior to the filing of this bill prevailing between the railroads and five or six companies that make rails. In that regard Percival Roberts, jr., who was a director of the Pennsylvania Railroad, testified (volume 13, p. 4957):

"During the presidency of Mr. Cassatt of the Pennsylvania Railroad, about the year 1900, he inaugurated a system for the Pennsylvania Railroad of making his purchases yearly at about the end of each calendar year for the succeeding one, and also proportioning his orders among the various rail mills, somewhat along the lines of their respective freight tonnages (see volume 10, p. 3996), not exactly accurately in regard to the latter point. This was done partially from the fact that they established a system of yearly budgets for their ensuing year's work, and they did it for the reason that they desired, as far as possible, to give uniform treatment to manufacturers along the lines of their road. Prior to that time purchases of rails were made from time to time as requirements might warrant. Many of the other leading railroads of the country, upon the inauguration of this policy, pursued the same, so that from that period on rails have usually been bought within a very few months covering the entire subsequent year. This is a distinct change from the method of handling this business prior to 1900."

The practical working out of this plan is shown in the proof (volume 13, p. 4050), and discloses the fact that, while

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the standard Bessemer rail still keeps to a standard price, there is a difference in non-Bessemer, which latter rails, with alloys, nickel, and manganese rails, constitute 70 per cent of the product. These non-Bessemer, "open-hearth rails are made to special analysis; the chemical composition is different, due to the fact that some railroads insist upon greater physical tests than others, which, of course, while the open-hearth process is the basic operation, nevertheless we call them different qualities of rails." In describing the method of arriving at the rail price of the four different years of 1910, 1911, 1912, and 1913, Mr. Farrell, president of the Steel Company, and Mr. McCrea, president of the Pennsylvania Railroad, themselves fixed the price for the special rails sold to that company. The former (volume 10, p. 4052) says:

"Most of the large trunk lines have their own specifications. The Pennsylvania Railroad Company, for example, buys about 250,000 to 300,000 a year. They have their own rail specifications prepared by their engineer. We charge them for their rails $30.55 a ton, which we consider a fair price for rails of that specification. * * * We tried to get a little more. In this instance we figured those rails ought to net us $30.85 a ton, but Mr. McCrea talked [153] to me about the thing, and said, 'Now, I think that we might shade this a little bit,' so that finally, it was just a question of merchandising, two people sitting down and trading across the table, the seller getting the best price he could, and the buyer getting the best price he could, and we received $30.55. We make these special qualities of rails for a great many people."

It will also be seen from other proof (volume 11, p. 4145; volume 26, p. 10834) that the fact of a rail mill being situate on the line of a railroad is naturally a large element in securing it as a rail buyer. Indeed, a study of the testimony—from which we refer to Shook, volume 25, p. 10491; Welborn, volume 26, p. 10937; Schwab, volume 11, pp. 4162, 4327, 4387; Smith, volume 19, p. 7940—satisfies us that, whatever may have been the practices of rail pools, combinations, etc., prior to 1900, and during possibly some of the earlier years of the Steel Corporation, the dealings between the railroads and the rail-making companies have been of later years on a competitive basis, individual railroads dealing with individual companies. The policy of the Pennsyl-

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vania Railroad Company of distributing the railroad's annual requirements on the basis of the freight furnished by each mill would seem to have put an end to the trade wars between rail mills when rails were sold below cost (Roberts, volume 13, p. 5015; Scranton, volume 8, p. 3200), and companies were driven into and threatened with bankruptcy. The proof is explicit (volume 11, p. 4162) that $28 has for years been accepted by the railroads as a fair base price for rails, and that they have asked no reduction. There is no proof that such price is unfair, and the proof (volume 11, p. 4165) is that the mill cost of rails is from $22 to $23 per ton. The testimony of one large rail maker (volume 11, p. 4162) that, in his judgment, rails are too low, has support from the fact testified to by the president of the Republic Iron & Steel Company, who says (volume 28, p. 12002):

"We quit manufacturing rails because there is no money in them. * * * (Volume 28, p. 12018.) I came into the Republic Company in 1906, and we had, according to my recollection, 50,000 to 60,000 tons of rails on our books which I did not care to produce. I saw possibilities of making money on something else, so I replaced those contracts; in other words, I bought the rails from other producers and satisfied my contracts, and changed the rail mill into a sheet and tin bar mill. That was in the early part of 1907, according to my recollection, or the latter part of 1906."

To the above manufacturing cost must be added overhead, interest, and depreciation. The general nature of the last item, particularly in the change from Bessemer (volume 10, p. 3857) to open-hearth, we have already seen. The proofs (volume 8, p. 3034) show that for several years the price of rails, $28, has been lower in this country than in France, Germany, Austria, Italy, and Russia. It will also be noted that the practice of re-rolling rails, an industry that has lately sprung into existence (volume 10, p. 4028) and grown to large proportions, enables railroads to have their old rails re-rolled into lighter sections, has, in its simple mills, created another factor by which the railroads can protect themselves. It would seem, therefore, that on the whole, the weight of these proofs would tend to show that at the date of the filing of this petition the price of $28, at which the standard Bessemer rail was selling, was

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not chargeable to the Steel Company [154] as a violation by it of the statute here involved. Indeed, in connection with the continuance of this uniform price of $28 for standard Bessemer rails, which, as quoted elsewhere in this opinion, was testified (volume 17, p. 7909) as being tacitly accepted and continued by the sales managers of different rail companies, we can readily see how rail manufacturers simply followed that basic price to prevent the ruinous rail wars of the past. In that regard one of them (volume 11, p. 4387) testified:

"There is not a manufacturer of rails in the United States to-day—I, for example, as a rail manufacturer, feel that if I were to vary that price of $28 for rails, which seems to have been recognized by all rail manufacturers as a fair price and giving a fair profit—if I were to vary that 10 cents a ton I would precipitate a steel war, to use such a word or expression, that would result in ruining my works without any profit. Everybody by tacit and mutual understanding felt the same about that. * * * I would not vary the price of my rails under any circumstances, not if I knew it was to get 100,000 tons in order, for the reason that my competitor next door would put the price down $1 a ton, or $.50 a ton even, and we would be in a position where we would be running without any profit at all."

Under all the evidence bearing on this subject, we cannot regard the uniform price of $28 as the generally accepted price of a standard Bessemer rail evidences an unlawful restraint or control of price by the rail-makers of the United States.

[5] We take up next the subject of the "Gary dinners," which (as already stated) we have reserved for separate treatment. We use the term to cover a comparatively short period, beginning at an exceptional business situation, and continuing until normal conditions were re-established. These dinners—which were business meetings with a social aspect—began in November, 1907, and were held at irregular intervals during the next 15 months, and perhaps a later date. We speak of a later date, because the Government understands the term to cover committee meetings, also with some other gatherings, which were held infrequently until early in 1911. Probably it will be sufficient to say that, whether the period was longer or shorter, the element that

marks it and calls for consideration now is what may be called the "coöperation" of the Steel Corporation with a large number of independent competitors, who, it will be noted are not made parties to this bill, and who comprise some 45 per cent of the steel and iron industry of the United States. This is the only instance of such coöperation, and the whole movement was exceptional. There is some dispute in the briefs concerning the essential characteristics of these meetings, but, in our opinion, the real facts appear with sufficient clearness.

We may begin the discussion by quoting the Government's concession in the original petition:

"It is not here alleged that merely assembling and mutually exchanging information and declaration of purpose amount to an agreement or a combination in restraint of trade."

With this concession we are in full accord. In these days every large business has its societies and associations, and these meet periodically to exchange information of all kinds, to compare experiences, to take note of improvements in machinery or process, to discuss [155] problems, and generally to profit by the interchange of ideas and the study of observed facts. When the business is manufacturing, of course, all this has a direct bearing on the subject of prices, and these conferences may therefore consider that subject specifically. It is probably unusual, however, to find such a meeting making a declaration of intention to charge such and such prices, although a mere declaration to that effect could hardly be regarded as unlawful. Freedom of speech and freedom of individual action are justly prized in American society, and no legislation forbids men to come together and speak freely to each other about every detail of their common business. And if each individual should choose to announce at such a meeting the specific price he intends to charge for his wares, we are aware of no law that forbids him so to do. But at this point we approach debatable ground, for an individual is permitted to do some things that are denied to an association of individuals; and where at a meeting of many persons such action is taken whose legality is afterwards called in question, the decision

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may be vitally affected by ascertaining the fact whether the action was really taken by each individual acting for himself, or whether those present were, in fact, pursuing a common object.

This country has always been committed to the principle of fair and real competition in business—the struggle between individuals to sell goods in a market free from artificial control or influence—and the Sherman Act merely repeats this principle when it condemns, in the first section, "every contract or combination in restraint of trade." When, therefore, individuals or corporations make distinct contracts with each other, either in the form of pools or other agreements, dividing territory, limiting output, or fixing prices, there can be no question about the illegality of such contracts. And it makes no difference whether or not the agreement attempts to fix a penalty for its breach. The essence of the offense is that agreement; the penalty is merely an incident; so that a so-called "gentlemen's agreement" to divide territory, etc., is quite as illegal as a formal pool with a formal penalty. In a gentlemen's agreement the sanction is the sense of honor, the moral obligation, the indefinite, but real, force that in some instances compel persons to keep their promises simply because they have promised.

But suppose what happens is this: A number of persons take no action about territory or output, their discussions being mainly concerned with the subject of price, and suppose, further, that they refrain from making a definite formal agreement, and limit themselves to an understanding, a declaration of purpose—an announcement of intention—what, then, is to be said? Have they offended against the law? This question cannot be answered until we know what the participants were really doing. It is not enough to rest upon the varying names that may be given to the transaction. It is of the utmost importance to know how these names are to be interpreted, and this is the crucial matter to be looked for in the present record. Fortunately we find no material dispute on this point after we get below the mere surface of much that has been said by the witnesses.

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[156] The first Gary dinner was held in November, 1907, at a time of unusual financial danger, when the threat of a serious panic was still in the air and when ruin to many important interests was by no means improbable. The meeting was attended by representatives of from 90 to 95 per cent of the iron and steel trade, including the corporation and a large majority of its competitors, and the course of the meeting has been described by several of those in attendance. Charles M. Schwab, now president of the Bethlehem Steel Company (volume 11, p. 4194), testified:

"The steel trade promised to become in a very demoralized condition. * * * Prices had gone very low. There was a very scant demand for steel. As I stated before, many people had their warehouses full of steel. When I say there was a demoralized condition, I mean people felt that the market was going to go very low and they were loaded with stocks. In general, there was a very uneasy feeling throughout the whole situation.

"Q. To what class was this situation—to what class, I mean, of persons interested in the steel industry, was this situation—particularly threatful?—A. To the people who had stocks, the merchants of steel, the sellers of steel, the retailers.

"Q. The middlemen or merchants; the retailers?—A. Exactly; the warehousemen.

"Q. Were they especially loaded up at that time?—A. They were. * * * (Volume 11, p. 4195.) A. The keynote of the whole dinner was an address by Judge Gary, or rather a talk to all the members there, with a view of their not becoming panic-stricken; with a view of their not sacrificing the situation by too great a cut in prices, and a precipitation of bad business methods; that we ought to retain our heads and not become excited over a situation of that sort, and that we should calmly await the return of prosperity; that our usual pro rata of business would probably come to each one, regardless of the prices at which it was done; and that it was unwise business policy and bad for the industry, and especially bad for the people who carried stocks, to precipitate and make worse such a demoralized condition. That was the keynote of everything that was said at that dinner.

"Q. Was anything said about entering into an agreement fixing prices or output?—A. Nothing whatever.

"Q. Were prices mentioned?—A. Not at all.

"Q. Was any price of any product mentioned?—A. No; not at all.

"Q. I mean a definite price for a definite product.—A. It was not discussed at all.

"Q. Only a general talk along the line mentioned.—A. Just a general talk along the lines indicated.

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"Q. Was it voted to appoint a general committee or sub-committees at that meeting to study and take care of the situation?—A. I do not know whether those committees were appointed at the first meeting or not, but they were ultimately, I know. Committees were formed of people in the various lines of industry, people familiar with that particular line of industry, to take up in detail the keynote expressed at the first dinner."

James Campbell, president of the Youngstown Sheet & Tube Company (volume 5, p. 1853) says:

"Q. Now, Mr. Campbell, will you describe the conditions which existed when these meetings about which you have been questioned were begun?—[157] A. Prior to the first Gary Dinner, in the fall of 1907, there was a money panic in New York, as they called it. Money was very tight, and you could not get currency, and you could not get credit, and the conditions to the business man and to the banker were very grave at that time. Judge Gary called the leading manufacturers in the steel business together at a dinner, and afterwards that was named the Gary Dinner.

"Q. Did the alarm as to these conditions exist among others than the manufacturers of steel and iron?—A. Among everybody.

"Q. Was it felt by the banking interests throughout the country, by the small country banks, as well as the big banks in New York City?—A. Yes; we had $1,750,000 on deposit with our bankers in New York and Cleveland and Youngstown at the time, and we were obliged to pay our men in clearing house certificates, rather than to try and draw that money out of the bank to pay them in currency. We felt that we ought to assist the banks to that extent in securing the currency, as it was almost impossible at that time to make up pay rolls and pay in currency.

"Q. Then the condition of affairs which existed at that time was a menace not merely to the manufacturers and the banks, but to the laboring man as well?—A. To everybody—the laboring men and men in every class of business.

"Q. What were the conditions with respect to the jobbers, especially with respect to stocks on hand; were they in danger?—A. The jobbers had quite large stocks. It had been a very prosperous year, the largest year up to that time that we had known, and all jobbers and all consumers, as far as we could learn, had very large stocks of material on hand.

"Q. And a sudden and great fall in the value of those stocks would have been a great financial harm to those jobbers and consumers?—A. Put about one-half of them, I think, in the hands of receivers, and would have carried down banks and business houses generally, besides bankrupting most of the small manufacturers, if they had suffered similar depreciations with reference to their material.

"Q. Were these conditions strong in the minds of you gentlemen when you commenced to meet, as you have described?—A. They were. Those were the days when we were lying awake nights. I think everybody was alive to the situation, and everybody was alarmed.

"Q. Was there a desire on the part of you gentlemen meeting there to sink selfish interests for the general advantage of the situation?—A. There was; yes; but it was a selfish interest after all. If we put our jobbers and consumers out of business, they would not be able to pay us for the material they already had bought from us. We all had large sums of money on our books, and nobody was in a position to pay anything at that time, and we were anxious to protect them in order to protect ourselves. It was not unselfish entirely, but, of course, I think we were all broad enough to feel that we wanted to protect the general country for the general good, because it would have been a bad thing for us, as well as anybody else, if we had had a panic that would have carried with it wreck and ruin all along its path.

"Q. Was the advantage hoped to be gained, if any was gained, that which followed from these meetings as great or greater to the independents as it was to the subsidiary companies of the United States Steel Corporation?—A. I think it was greater to the independents, because I think it kept a number of them from going into the hands of receivers, and the corporation probably would not have failed, even though they had had serious losses.

* * * * * * *

"Q. Was not the purpose of those meetings to enable every one present to form his opinion as to what was the best course to follow individually under the conditions which were bound to exist, with a full knowledge of those conditions as given by all the other members present?—A. It was."

[158] Judge Gary, chairman of the Steel Corporation (volume 12, pp. 4775, 4887) testified:

"The trouble ordinarily with a purchaser of our commodities is that he is obliged to stock up so to speak; he has on hand large stocks of goods which he has purchased at a certain price, and many times he has purchased those goods by borrowing money at the banks. Now, if a wide and sudden fluctuation comes, the inventory value of his stock on hand is immediately decreased accordingly, and he has a very severe loss, and his bank calls upon him for the payment of his loan, and he is unable to do it because he cannot dispose of that stock at a reasonable price, or at a price which will return him the money he had invested. * * * Just to refer to the panic of 1907, we had repeated letters and repeated calls from people we were selling goods to, who had stocks on hand, and who were not in a financial condition to survive, if the demoralization which was threatened should become actual, asking us, so far as we could, to try and steady the market

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in order to prevent demoralization, which would bring great loss upon them, and in many cases absolute ruin. * * * The meeting was held shortly after the beginning of the panic of 1907, after the worst had passed, but while the effect remained to a less extent. We were importuned, or, I will say, we were requested, in various ways, by various consumers, to do all we could to prevent demoralization in business. Many of our customers reported to us they had large stocks of goods on hand, and, if the prices became demoralized, as they had in previous years there was great danger of loss to them, and perhaps failure. In those days particularly iron and steel were considered the barometers of trade, so to speak; that is, the market for steel largely affected all other business conditions. In conversation at different times with bankers and others I knew the question was asked whether or not the steel business was going to pieces; whether we were liable to get into the condition that had obtained previously. We were all in very great danger of demoralization. I believed, if the iron and steel trade got into that condition, the panic would be long continued, and a great loss and injury would result, not only to the manufacturers of steel but to every one else who was interested in the manufacture of steel or dependent upon the manufacturers.

"I might add to that we had on our books accounts receivable aggregating hundreds of millions of dollars, and of course an ordinary old-fashioned steel war meant destructive competition, the survival of the fittest and ruin, or at least the temporary suspension of a great many people, and would result in great loss to us and loss to all other manufacturers, great hardship to our employés, and very serious injury to the business world in general. * * *

"I stated the purpose and object of the meeting were if possible to prevent the demoralization of business. I stated that the first object of the meeting was to secure a better acquaintance with each other and come into close contact in order to know one another, hoping that we might deal with and towards one another as gentlemen and not as enemies. That the purpose was, if possible, to prevent demoralization of business, to secure as far as practicable stability of business conditions, as opposed to wide and sudden fluctuations; to prevent, if possible, failures on the part of our customers, and to comply with their wishes in every respect; to prevent, if we could, a long continuance of the panic, which meant failures to a great many people and manufacturers themselves, because of their debts at the banks or because of their commitments for extensions and to customers because of the large stocks they had on hand, the sudden change in the prices of which might be very damaging, and, so far as we properly could, to maintain or to assist in maintaining business conditions generally the opposite of which should be deplored. I am giving you the substance of it. (Page 4894.)

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"I stated distinctly * * * at that time that, as they all understood, we could not make any agreement, express or implied, directly or indirectly, which bound us to maintain prices or restrict territory or output; it must leave us free to do as we pleased, and must rely upon a disposition of all [159] others to do what they considered fair and right and for the best interests, not only of themselves, but all others who had any interest in that or any other work. I made that perfectly plain." (Page 4895.)

We think it likely that, if this first meeting had not been followed by others and by the appointment of committees to continue the association (loose as it was) that resulted from that meeting, no complaint would be heard from the Government. But we think the evidence makes it plain that a period of coöperation, or action with a common object, did begin in November, 1907, between the Steel Corporation and the great majority of its independent competitors, and that this period was chiefly marked by an understanding concerning the maintenance of price. Other matters were discussed at various meetings, but the principal concern was the subject of prices, and other subjects were subordinate. Without quoting too freely from the testimony, we think the following extracts are typical: A representative of the Carnegie Company testified:

"Q. You were asked about whether you had any agreement, and you said, 'No.' What did you mean by agreement, in the sense that you answered that question?—A. I meant a formal undertaking, either written or expressed by word.

"Q. What do you mean by a formal undertaking?—A. I mean by a formal undertaking, an expression in a formal way.

"Q. In what way? I would like you to explain that.—A. Either in writing, or by word of mouth.

"Q. What kind of an expression in a formal way? Do you mean something of the nature of a contract?—A. I presume you mean by passing a promise?

"Q. No, I am not saying what I mean, but I am trying to get at what you mean.—A. What I mean is this: That there was no absolute promise made by anybody.

"Q. That is what you meant when you said that there was no agreement?—A. Yes.

"Q. I will ask you whether or not you left with the general understanding, each relying upon the other, that the prices announced would be maintained?—A. Yes, sir. Yes, sir.

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"Q. And what would interrupt the maintenance of that price according to that understanding that you left with?—A. Usually one competitor would take some business away from another competitor.

"Q. As I understand you, that would be the occasion of another meeting?—A. Yes, sir.

* * * * * * *

"By Mr. LINDABURY:

"Q. I will read from the bill in this case: 'It is not here alleged that merely assembling and mutually exchanging information and declaration of purpose amounts to an agreement or combination in restraint of trade.' I will mark that so you can read it and hand it to you (handing witness the paper referred to). My question—and you may pause to consider it if you choose—is whether or not, at any of these meetings you attended, beginning in the autumn of 1907, anything more was done than is there stated?—A. No, sir.

"By Mr. DICKINSON:

"Q. You said that you assembled?—A. Yes, sir.

"Q. You exchanged information?—A. Yes, sir.

"Q. And you declared purposes as to prices?—[160]A. Yes, sir.

"Q. I understood you to say, also, that you left, each relying upon the other that that price would be observed by them, and that the announcement of that price was made to the trade?—A. Yes, sir. (VI, 2505–2509.)"

A representative of the McKeesport Tin Plate Company testified:

"Q. Was there or not what you understand as a gentlemen's agreement as to following the price that was named, until the next meeting?—A. There would be a general understanding that we would do what we would say we would do—quote a certain figure until, as I say, we found reason to change it; and, if we found reason to change it, we would notify our competitors, or talk with them about it, when another meeting would be held and conditions discussed.

"Q. Another meeting would be held?—A. Yes, * * *

"Q. Would or not a price be suggested?—A. A price would always be suggested.

"Q. State whether or not, before they left, there was any difference as to what each one said he was going to charge, or whether it would be the same.—A. It was always unanimously agreed, or the statement was unanimous on the part of all, that they would quote a certain price. (V, 1777).

* * * * * * *

"Q. What would you do, if anything, in regard to the future prices?—A. Then we would say, 'Well, we will quote a certain price until we find reason to change it.'

"Q. Then you would leave with the same understanding that each was going to sell at that price?—A. Yes, sir.

"Q. State whether or not anyone made any remark at any such meetings that if they cut the price it would be found out?—A. I think we discussed that among ourselves in general. I might say that if any one quoted a lower price to a particular customer of mine than we did, I would find it out. (Vol. V, 1778.)

* * * * * * *

"Q. Was it or not a part of your understanding, after these prices were announced, that you were under a moral obligation to sell at that price until you did notify your competitors?—A. Yes, sir." (V. 1793.)

Now to our minds the testimony taken as a whole makes the conclusion inevitable that the result of these meetings was an understanding about prices that was equivalent to an agreement. We have no doubt that among those present some silently dissented and went away intending to do what they pleased; but many, probably most, of the participants, understood and assented to the view that they were under some kind of an obligation to adhere to the prices that had been announced or declared as the general sense of the meeting. Certainly there was no positive and expressed obligation; no formal words of contract were used; but most of those who took part in these meetings went away knowing that prices had been named and feeling bound to maintain them until they saw good reason to do otherwise, and feeling bound to maintain them even then until they had signified to their asssociates their intention to make a change. We cannot doubt that such an arrangement or understanding or moral obligation—whatever name may be the most appropriate—amounts to a combination or common action forbidden by law. The final test, we think, is the object and the [161] effect of the arrangement, and both the object and effect were to maintain prices, at least to a considerable degree.

We have said that this was the effect intended, and we believe it to be true; also, that in actual effect prices were more or less maintained. But it is quite as true that a large section of the trade paid little attention, if any, to this effort at coöperation. We need not quote again from the record to establish this point, for we have already made sufficient extracts earlier in this opinion. The testimony quoted on pages 84 to 88 will make it abundantly clear, we think, that, even during the period of coöperation,

the prices announced and informally assented to at these meetings were not regarded at all by many manufacturers, for it is plain that the consumers who testified had no difficulty in buying at rates sensibly below the prices thus referred to. It is only fair to add that in our opinion the participants in this movement did not intend to act illegally. No doubt they did intend to exercise their full legal rights, but, of course, such exercise could not be wrong, and they believed they had succeeded in keeping within the proper limits. For the reasons given, we think they were mistaken; but we acquit them of trickiness or attempted evasion.

But the period of coöperation had passed away before the bill was filed, and, as far as we can see, it is not likely to be repeated. We do not think the Gary movement would justify us in imposing so drastic a penalty as the dissolution of the corporation; but we will, if the Government moves for such action, retain the bill for the purpose of restraining any similar movement by the defendants that might be contemplated hereafter. We may perhaps suggest that under recent legislation Congress may have provided a sufficiently inclusive remedy for any future action that might have for its object the adoption or the maintenance of unreasonable prices.

In brief, the conclusions of the court are these: As to some of the defendants it is apparent the bill should be dismissed. Concerning the principal relief sought against the corporation and its subsidiaries, we are of opinion that the Government has not made out a case that should be followed by a decree of dissolution, and we are also of opinion that sufficient reasons have not been afforded to justify us in now awarding an injunction. But, as already stated, if the Government so desires, the court will retain jurisdiction of the cause for the purpose above outlined.

In concluding this opinion, we are requested by each of the members of this court to express the thanks of this court to all the counsel engaged in the cause and to record our appreciation of the labor on their part evidenced in their several briefs, digests, cross-references, indices, etc.

It is but just to say that the thorough preliminary work on the part of counsel has greatly aided our labors and has enabled us within the limits of reasonable time and without delaying our routine work, to reach a reasonably prompt determination of this cause.

A decree may be prepared in accordance herewith.

WOOLLEY, Circuit Judge, with whom HUNT, Circuit Judge, concurs.

In an endeavor to state with brevity the matters of law and fact which have directed and controlled my judgment in this case, no [162] attempt will be made to review the great mass of testimony or to discuss the law bearing upon it.

[6] Whether the Steel Corporation is a combination in restraint of trade, or has monopolized, or has attempted to monopolize, commerce among the States in violation of the Anti-Trust Law, depends upon the inherent nature or effect of the combination, the evident purpose of its acts, or the intent to be inferred from the extent of the control secured over the industry, the method by which such control has been brought about, and the manner in which it has been exerted, resulting in prejudice to the public interests by unduly restricting competition or unduly obstructing the course of trade. *United States* v. *Terminal R. R. Ass'n*, 224 U. S. 383, 394, 32 Sup. Ct. 507, 56 L. Ed. 810; *Nash* v. *United States*, 229 U. S. 373, 33 Sup. Ct. 780, 57 L. Ed. 1232; *Standard Oil Co.* v. *United States*, 221 U. S. 1, 31 Sup. Ct. 502, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912D, 734; *United States* v. *American Tobacco Co.*, 221 U. S. 106, 179, 31 Sup. Ct. 632, 55 L. Ed. 663.

There is no question that the Steel Corporation is a combination. The question is whether it is a "combination * * * in restraint of trade," and whether the corporation, its subsidiaries, and the individual defendants who actively engaged in its organization, monopolized, or attempted to monopolize, or combined with others to monopolize or restrain, trade within the meaning of the act. Inquiry to this end may be pursued along four lines:

First. Was the direct and necessary effect of the organization of the corporation to unduly restrain trade or create a monopoly?

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The important business units which at or about the time of its organization comprised the United States Steel Corporation (which in default of a better term will be called the "constituent combinations") were the Carnegie Steel Company, Federal Steel Company, National Tube Company, American Bridge Company, National Steel Company, American Steel Hoop Company, American Sheet Steel Company, American Tin Plate Company, and American Steel & Wire Company. Each of these units was in itself a combination of concerns engaged in the manufacture of the same or allied products. The effect of the organization of these combinations was to suppress competition between their component parts, and the effect of the organization of the Steel Corporation, by embracing these combinations, was to give it a control over the industry equal in the aggregate at least to that which its constituent parts and their subsidiaries had theretofore possessed. The Steel Corporation therefore is a combination of combinations, by which, directly or indirectly, approximately 180 independent concerns were brought under one business control, thereby giving it not only the assets and business of that number of producers, but the advantage of their elimination from the field of competition. It is therefore pertinent to ascertain whether the amount of competition suppressed by the combination of producing units was so great, the percentage of business acquired so large, or the resultant control over the industry so potential, as in and of itself to constitute the Steel Corporation a monopoly, independent of any question of intent.

[168] The inherent power or the direct and necessary effect of the corporation to unduly restrain trade must be gathered from what it did with the power it had during the period between the date of its organization and the date of the institution of this suit, and what it was unable to do with that power.

What the corporation did constitutes conduct, a subject which will presently be considered, and what the corporation did not do is so related to conduct that the two will be considered together. What the corporation had the power, or did not have the power, to do must first be determined.

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The power of the corporation may be ascertained by its position in the industry. Its position has doubtless been attained by a combination of forces, which may include high efficiency of plants, excellence of organization, capacity of employés, and its measure of control over raw materials and the production of finished products. As there can be no monopoly of efficiency and capacity, inquiry concerning the power of the corporation therefore leads mainly to its dominion over the raw materials and finished products of the industry.

The ore reserves acquired by the corporation at and subsequent to its organization, the relation which such reserves bear to ore bodies then existing and subsequently discovered, and their bearing upon the question of monopoly of raw materials, are matters which have been discussed in the preceding opinion, and with the reasoning as well as with the conclusion that the corporation has not a monopoly of the raw materials of the steel industry, I am in entire accord.

A more extended consideration of the power of the corporation, derived from its ore reserves, is unnecessary, further than to dispose of a transaction connected with the acquisition of certain ore properties.

[7] Prior to the organization of the Steel Corporation, John D. Rockefeller became interested in a number of ore properties in the Mesabi Range, in Minnesota, and in properties primarily intended for the transportation of ores to the market. These properties were the Lake Superior Consolidated Iron Mines, which owned a considerable group of iron-ore properties in that region; a railway company running from Mesabi Range to Duluth, called the Duluth, Missabe & Northern Railroad Company; and a steamship company, owning a group of steamers plying the Great Lakes, called the Bessemer Steamship Company. The mining company owned the railway company. John D. Rockefeller owned $^{25}/_{29}$ of the stock of the mining company. He owned all the stock of the steamship company.

After its formation, the Steel Corporation contracted with John D. Rockefeller for the purchase of his interest and the

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interest of the other stockholders in the Lake Superior Consolidated Iron Mines and the Bessemer Steamship Company and paid for the latter $8,500,000 in cash, and for the former, stock of the Steel Corporation at the rate of $1^{35}/_{100}$ shares of the preferred and $1^{35}/_{100}$ shares of common for each share of the Consolidated Iron Mines, reckoned on a capitalization of $48,000,000; the curent market price for the Steel shares being, respectively, 83 and 38.

[164] John D. Rockefeller and his son, John D. Rockefeller, jr., were made directors of the Steel Corporation. The former resigned in 1904, and the latter in 1910. John D. Rockefeller disposed of all of his stock, and John D. Rockefeller, jr., disposed of a considerable portion of his stock in the Steel Corporation, acquired by the aforerecited transaction, prior to the filing of the bill in this case.

The bill charges the acquisition of the Consolidated Iron Mines and Bessemer Steamship Company subsequent to the organization of the corporation. It also charges generally that the individual defendants named in the bill, by the subsequent acquisition and control of properties, entered into a combination with the corporation in restraint of trade; but in this connection the defendants Rockefeller are not named. The sole specific statement of fact in the bill with respect to the defendants Rockefeller relates to the sale to the corporation of stock of the Consolidated Iron Mines and the Bessemer Steamship Company, and the sole specific charge is that these defendants were largely interested in those properties, and that "both of them participated in bringing about the combination and became members of the first board of directors of the corporation."

By the prayer of the bill, the properties acquired from the defendants Rockefeller are not asked to be returned to them, or that the sale be avoided, but that the ore properties of the corporation, which of course include those acquired from the defendants Rockefeller be divided among certain corporations contemplated by a decree of dissolution in proportion to their capacity for the production of steel.

There is no evidence or assertion that the purchase of the Consolidated Iron Mines and the Bessemer Steamship Com-

pany, and incidentally the Duluth, Missabe & Northern Railroad Company, was included in the original scheme for the organization of the Steel Corporation, nor is there evidence which shows that the defendants Rockefeller took part in the promotion or organization of the corporation. By stipulation with the Government, it is in evidence that, at the time the bill was filed, the defendants Rockefeller had no relation of management or control to the Steel Corporation, and there is nothing to show that they were then or are now violating or threatening to violate the statute.

We find that the transaction of the sale of the Lake Superior Consolidated Iron Mines and the Bessemer Steamship Company was no part of the original plan for the formation of the Steel Corporation; that the transaction was not only in form, but was in substance, a sale; and that the single fact that the purchase price of one of the properties was paid with stock of the corporation does not alter the legal character of the transaction as a sale or prove that it was violative of the statue. We also find that the purchase of these properties from the defendants Rockefeller did not so increase the ore reserves and the transportation facilities of the corporation as to give it a monopolistic power over the raw materials of the industry. For the reasons given, we are unanimously of opinion that the bill should be dismissed as to the defendants Rockefeller.

[165] [8] Further inquiring whether the corporation inherently possesses monopolistic power attention is next given to its proportion of the manufacture and sale of finished iron and steel products of the industry. Upon this subject there is a great volume of testimony, a detailed consideration of which in an opinion would be quite inexcusable. As a last analysis of this testimony, it is sufficient to say it shows that, large as was the corporation, and substantial as was its proportion of the business of the industry, the corporation was not able in the first ten years of its history to maintain its position in the increase of trade. During that period, its proportion of the domestic business decreased from 50.1 per cent to 40.9 per cent, and its increase of business during that period was but 40.6 per cent of its original volume. Its

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increase of business, measured by percentage, was exceeded by eight of its competitors, whose increase of business, likewise measured by percentage, ranged from 63 to 3779. This disparity in the increase of production indicates that the power of the corporation is not commensurate with its size, and that the size and the consequent power of the corporation are not sufficient to retard prosperous growth of efficient competitors.

From the vast amount of testimony, it is conclusively shown that the Steel Corporation did not attempt to exert a power, if such it possessed, to oppress and destroy its competitors, and it is likewise disclosed by the history of the industry subsequent to the organization of the corporation that if it had made such an attempt it would have failed. It is also shown by the testimony that, acting independently and relying alone upon its power and wealth, great as they were, the corporation has never been able to dominate the steel industry by controlling the supply of raw materials, restraining production of finished products, or enhancing and maintaining the prices of either.

If in its early history the Steel Corporation, singly and alone, endeavored to dominate the steel industry in any one or several of the customary ways (and such is not disclosed by the testimony), it ceased early to rely upon its own power. In fact, its lack of power to dominate the industry alone is established by the methods it was forced to institute and pursue with respect to the important matter of the fixation of prices, the legality of which, in my opinion, becomes the main point of inquiry in the case. Instead of relying upon its own power to fix and maintain prices, the corporation, at its very beginning, sought and obtained the assistance of others. It combined its power with the power of competing corporations, and then with its competitors concerted, coöperated, contracted, and then by tacit understandings contributed to the establishment and maintenance of prices. The coöperation by the Steel Corporation with its competitors to fix and maintain prices neither sprang from its inherent nature, nor was it the direct and necessary effect of its organization. It constituted conduct, and conduct of the same character as

that pursued by the corporation's competitors participating therein. The testimony does not show that the corporation in and of itself ever possessed or exerted sufficient power when acting alone to control prices of the products of the industry. The testimony abundantly shows that the power of the corporation to control prices was efficient only when in coöperation with its competitors. It has never [166] raised and maintained prices by its own action. It has done it only by joint action, and when joint action was either refused or withdrawn, the corporation's prices were controlled by competition. To the conduct of the corporation in fixing and maintaining prices by methods it with others employed, the charge of violation of the statute is most pertinently addressed.

Distinguishing the power of the corporation from its conduct subsequent to its organization, I am of opinion, for the reasons here given, that in its inherent nature the Steel Corporation is not a monopoly, and that the direct and necessary effect of the organization of the corporation was not unduly to restrain trade.

[9] Second. Was an intent to monopolize or to unduly restrain trade shown by the circumstances which led up to and surrounded the organization of the corporation?

For several years preceding the organization of the corporation in 1901, the steel industry was undergoing a revolution in business methods. Combinations of manufacturers producing the same, as well as diversified products, were formed upon tremendous scales, embracing in many instances a majority, and in some instances nearly all, the producers of a particular product. This industrial revolution and the combinations which grew out of it have been explained upon two theories.

The first theory is based, as it is contended, upon the discovery made at or about that time that the economic manufacture of a finished steel product required the ownership of the raw material and the manufacture of the unfinished product by the same corporation, and the manufacture of the unfinished product required facilities for finishing the same in order to secure a regular and certain output. In

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other words, a necessity for integration developed, that is, the manufacture of steel products on a large scale, beginning with the ore and concluding with the finished product, to accomplish which aggregations of mills that produced different commodities were essential. That this was in the minds of the steel masters of that day is without question, and it is now contended by the defendants that to attain this was the object of the formation of the Steel Corporation.

The other theory advanced in explanation of the tremendous and rapid combination of steel-producing plants at that period, in which less regard was paid to combining plants producing diversified products than to combining plants producing the same products, is that by such combinations, competition in trade could be suppressed to an extent commensurate with the amount of trade combined, and that by the resultant control, prices could be raised and maintained that would yield great profits.

Much testimony has been produced in this case by the opposing parties in support of and in opposition to these opposing theories, a review of which within the limits of an opinion is quite impossible to be made. Evidence of the acts and things done at the time they were done, the character of the combinations made, and the results then and subsequently attained, as disclosed by testimony which corresponds in point of time with the doing of the things, carry to my [167] mind a greater probative force in determining the reasons for the combinations and the purpose of the organization of the Steel Corporation than explanations thereof made at after periods. There is much testimony given by witnesses, looking back over the history of the corporation and its constituent combinations, to the effect that the purpose of the organization of the constituent combinations and then of the larger combination, the Steel Corporation, was to assemble huge properties so as to procure perfect integration. Yet the testimony which impresses me most is that which relates to and concerns the things said and done preliminary to and connected with the organization of these various combinations at the time of their creation. These circumstances indicate that the various combinations

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were made upon a scale that was huge and in a manner that was wild. Properties were assembled and combined with less regard to their importance as integral parts of an integrated whole than to the advantages expected from the elimination of the competition which theretofore existed between them.

Without referring to the great mass of figures which bears upon this aspect of the case, it is clear to me that combinations were created by acquiring competing producing concerns at figures not based upon their physical or their business values, as independent and separate producers, but upon their values in combination; that is, upon their values as manufacturing plants and business concerns with competition eliminated. In many instances, capital stock was issued for amounts vastly in excess of the values of the properties purchased, thereby capitalizing the anticipated fruits of combination. The control acquired over the branches of the industry to which the combinations particularly related measured by the amount of production, extended in some instances from 80 per cent to 95 per cent of the entire output of the country, resulting in the immediate increase of prices, in some cases double and in others treble what they were before, yielding large dividends upon greatly inflated capital.[6]

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[6] The organization of the constituent combinations, their overcapitalization, and the increase in the prices of their products are matters so complex in their recital, and embrace such a considerable portion of a record altogether unprecedented in size, that nothing more than a single instance can be briefly stated in a footnote.

The National Tube Company was incorporated in February, 1899. It was a combination of manufacturers representing from 80 to 90 per cent of the production of iron and steel wrought tubes in the United States. (V, 1891, 1913; G. E., V, pt. II, 1785, 1794.) An expert valuation of the properties acquired, exclusive of the Western Tube Company, was the sum of $22,303,500. (V 187–72.) For the properties and plants, so valued at $22,303,500, personal assets estimated at $10,000,000, and $2,500,000 cash furnished by the promotors, making a total of $34,808,500, plus the value of a part interest in the Western Tube Company, the National Tube Company issued to the consolidation purchasers over $79,000,000 in stock. (G. E., No. 2, 381–384, 392–394.) Of the approximate amount of $40,000,000 of preferred and $40,000,000 of common issued to the consolidation purchasers for the properties acquired by it (G. E. II, 372–394), it appears that the common

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[168] The immediate as well as the normal effect of such combinations, was in all instances a complete elimination of competition between the concerns absorbed and a corresponding restraint of trade. That for a time during that period monopoly was created and trade unduly restrained in certain steel products by the combinations which almost exclusively produced them is seriously charged and not satisfactorily denied. Such was the common knowledge of those conversant with the steel industry; and, as many of the men who participated in the organization of such combinations participated actively in the organization of the Steel Corporation, it is difficult to believe that they did not know that to some extent, and probably to what extent, such combinations restricted and suppressed competition, and that they did not expect, by force of the multiplied absorption of trade and by the power resulting from the increased elimination of competition, the Steel Corporation would be enabled to fix and regulate the production and prices of all commodities in the industry. Such would seem to be a natural thing to expect of a combination of competing corporations which in themselves were combinations of competing corporations, and it is but fair to charge that those who created such a combination of combinations intended what in the nature of the situation would be thought to be its natural and probable consequence.

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stock received by the consolidation purchasers to the amount of about $40,000,000 was to be distributed approximately as follows: To the vendors of the properties acquired, between $3,000,000 and $11,000,000 in excess of the cash valuations of their properties; to the syndicate in excess of the amount of cash furnished by it $5,000,000; to Morgan & Co., $3,500,000; and to the consolidation purchasers and Morgan & Co. for promotion between $20,000,000 and $28,00,000. The net earnings of the National Tube Company for the first six months were $7,909,060, a rate of 19 per cent per annum on the capitalization of $80,000,000; and the net earnings for the first fiscal year, after deducting expenses, depreciation, and reserve were $13,878,364.69, which is something over 17 per cent on its total capitalization. Before the formation of the National Tube Company the price of tubes was $30 a ton. During 1899, the year of its formation, the prices of tubes rose to $67 a ton, and in the early part of 1900, reached their maximum of 89 a ton (XXVII, 11390, 11391, 11426, 11427, 11433).

It was insistently urged by the corporation, both in the briefs and at the arguments of this case, that in the conversations between Mr. Schwab and Mr. Morgan preliminary to and during the negotiations for the combinations which were afterwards acquired by the Steel Corporation, no word passed between them concerning increased profits hoped for or expected to be derived from the elimination of competition, and that their discussions were addressed and limited to economies of manufacture and business. It is worthy of comment in this connection that, in so far as those conversations are repeated in the testimony, the word "integration" was not mentioned, and, excepting by inference, the idea of integration was not suggested by the one who gave, or by the one who responded to, the inspiration to create such a combination as the Steel Corporation. The purpose of its organization, in so far as it was expressed by either of those gentlemen, as disclosed by the testimony, was to acquire a number of mills in each of which to manufacture but one thing instead of many things, and to procure enough mills to make and manufacture every product in the steel industry, with the hope of acquiring the foreign trade. The precise reasons for the formation of such a combination, and the particular advantages to be expected therefrom, as [169] stated by Mr. Schwab to Mr. Morgan, in the conversations which are represented to contain the ideas which suggested and which justified the formation of the Steel Corporation, are:

"That instead, as was then the practice, of having one mill to make 10 or 20 or 50 products, the greatest economy would result from having one mill make one product and make that product continuously; * * * that various lines of steel should be so specialized; * * * that great economies would result from locating mills at the point of consumption by which the cost of transportation * * * would be reduced or saved; * * * that great economic results would follow from being able to manage these concerns in a manner that would stimulate the most effective effort in the management of the different concerns; * * *. that the great export business of this country in iron and steel could only be done in that way; * * *" the companies to be acquired were "such as to cover all the branches of the industry, * * *" and that "successful manufacture was only possible where every single step in the line of manufacture was

carried out by some one concern; and that for the greatest economy, for the greatest development of the business, it was an absolute necessity."

Continuing, Mr. Schwab said:

"I felt, furthermore, that great economies would result in all these general items of expense which are met in the manufacture of iron and steel on account of selling, traveling, office expenses, and all the general items of each individual concern which an individual line had to cover with a full organization. That could be covered by one such organization, and I felt that such economy would result in that direction, and indeed the whole line of my talk that evening was intended to show that the next great economic step to be made in the manufacture of steel—or indeed any business in general; I did not confine myself entirely to the steel business, directly to the steel business—but in general that the great economic result to be next obtained in manufacture was in the direction of these methods, and then I made that application generally to the steel industry."

Mr. Schwab then pointed out to Mr. Morgan the plants, which if acquired, "could be made ultimately to conform to this theory." It does not appear in the testimony just what plants Mr. Schwab suggested should be acquired, nor does it appear that Mr. Morgan acquired, or attempted to acquire, any plants of any independent producers of that day. It does appear, however, that Mr. Morgan proceeded immediately to acquire, not plants, but the huge combinations themselves which had but recently been formed, and which had but recently demonstrated their ability to suppress competition.

The objects of the formation of the corporation, as stated by Mr. Schwab, were those avowed at the time of its organization, and the things done to accomplish those objects must be accepted to have been done in the light of the situation as it then existed.

The declarations of Mr. Schwab with respect to the objects of the organization, and the conduct of Mr. Morgan and his associates in creating the corporation by combining the most powerful combinations which then existed, the conspicuous features of which were over-capitalization, and the elimination of competition, constitute evidence which must be considered in seeking the purposes for which the corporation was organized. That evidence, as against the testimony to

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the contrary, impels me to the opinion that the primary purpose of the organization of the Steel Corporation was not integration. Integration was a result of the organization, and afterward became a neces[170]sity. When integration was undertaken it was but imperfectly accomplished by employing the units acquired. It was only perfected by building new mills at a cost of over $400,000,000. After a consideration of the character and conduct of the combinations absorbed by the corporation, and of the complete knowledge of the industries possessed by those who brought the corporation into existence, I am irresistibly drawn to the conclusion that the object of the formation of a corporation which embraced such combinations, and the intent of those who undertook its accomplishment, were to secure great profits by restraining trade in the manner and upon the scale thought possible in the light of the history of the constituent combinations.

The constituent combinations absorbed by the corporation were strongest at their birth. Their percentage of output and their corresponding control over their particular branches of the industry were greatest when organized, but diminished year by year in combat with competitors who entered the field against them, supplied with ample resources, equipped with modern plants, and unincumbered with obsolete or dismantled properties. As an illustration, the American Tin Plate Company, incorporated in December, 1898, was a consolidation of 39 plants with 279 mills engaged in the manufacture of tin plate. It is charged and not denied that at the time of its formation this combination comprised 90 per cent of the tin plate manufacturers of the country, which controlled 95 per cent of the total output of tin plate in the United States. The result was an immediate rise in the price of its product and a decrease in the number of its producing units. As a consequence of its policy, 86 mills of 19 plants, about one-third of the mills acquired, were promptly dismantled. Notwithstanding this initial and potential control over the product and prices of the tin-plate industry, it nevertheless happened that while in 1899 the American Tin Plate Company produced 95 per cent of all

the tin plate manufactured in the United States, its control from that year gradually decreased, until in 1912 its proportion of the manufactured output was but 53.7 per cent. After it was absorbed by the corporation, it ceased to rely upon its own power to fix and maintain prices, complete as was its power at first, and, like the other subsidiaries, was forced to coöperate with its competitors.

The experience of the American Tin Plate Company is illustrative of the history of various combinations absorbed by the Steel Corporation. It is likewise the explanation of the seeming anomaly that the corporation, at the time of its organization, in and of itself, possessed less power as a monopoly than certain of its constituent units possessed at the dates upon which they were respectively created. The absorption by the Steel Corporation of combinations which in themselves possessed monopolistic powers, potential in their beginning, though waning as they progressed, irresistibly draws me to the conclusion that those who organized the Steel Corporation expected to accomplish permanently what had been demonstrated could be accomplished temporarily, and thereby to monopolize and unduly restrain trade. But when organized, the corporation discovered that it was confronted by forces beyond its control, that it was affected by [171] trade laws and conditions which in its organization were either forgotten or ignored, and that therefore it was without the power alone to do what its organizers expected of it, and was immediately forced to resort to the old device of pools in order to control and maintain the prices of its products. I am of the opinion that the circumstances which led up to and surrounded the organization of the Steel Corporation show that those who organized the Steel Corporation intended it to monopolize and unduly restrain trade.

Third. Was intent to monopolize or to restrain trade shown by the after conduct of the corporation?

There are a number of customary tests by which the existence of trade restraint may be ascertained and the extent thereof may be gauged. In applying these tests to the after conduct of the corporation, the testimony responds, in

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my opinion, by disclosing but one line of the corporation's conduct violative of the statute.

There is nothing in the evidence that suggests that the corporation used its power to gain advantage over its competitors by securing freight rebates. On the contrary, it appears that early in its history the corporation announced a policy and promulgated a rule against soliciting and accepting rebates.

There is nothing to show that the corporation increased its profits by reducing the wages of its employés. The increased volume and reward, as well as the improved conditions of labor, for which the corporation, at considerable length, takes credit to itself, have no bearing upon the issue of monopoly, except as they tend to prove that monopoly was neither attempted nor acquired at the expense of labor.

There is nothing in the evidence that suggests the corporation increased its profits by lowering the quality of its products. The testimony that the quality of the corporation's products has not deteriorated, but has improved, is pertinent to the inquiry whether monopoly was attempted or accomplished at the expense of the quality of its products, but the considerable volume of testimony as to the high quality of its products and the excellence of its service has no probative bearing upon the issue of monopoly. The question is not whether the corporation is a serviceable monopoly. The question is whether the corporation is a monopoly.

There is nothing which discloses that the corporation either increased its power or augmented its profit by creating an artificial scarcity of its products.

The testimony does not show that the corporation oppressed or coerced its competitors. In fact, there is an abundance of testimony contributed by the competitors of the corporation to the effect that its competition, though vigorous, was fair.

The corporation did not undersell its competitors in particular localities, by reducing prices below the prices at which it sold in other localities, nor did it require its customers to enter into contracts either limiting their purchases to the corporation or restricting them in resale prices. While pur-

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chasing pig iron at prices higher than the market, in order by reflection to maintain or increase the price of steel, purchases were not made by the corporation beyond its needs, nor with the intent or re [172] sult of cornering the market. It did not obtain customers of competitors by secret rebates, or departures from its published prices, so long as the prices agreed to were adhered to by others pursuant to methods presently to be considered. There is no evidence that it attempted to crush its competitors or drive them out of the market, and in its competition it seemed to make no distinction between large and small competitors. In fact, its conduct toward its competitors, as shown by the testimony, has been conspicuously free from that business brutality, meanness, and unfairness which characterized the conduct of certain large corporations found guilty of violating the Anti-Trust Law.

The charge that the corporation offered lower prices in return for large purchases running over long periods, if true, does not constitute unfair trading. In those instances, the corporation endeavored and succeeded in obtaining contracts for large purchases of unfinished, or semi-finished materials, so as to secure a steady trade for a long period, and thereby secure steady and certain employment for its mills.

The corporation's reply to the charge of undue restraint of trade, by combining with others to fix and maintain prices, and the assumption to itself of credit for the benefits arising from its conduct "in *steadying* the market and preventing rapid and extreme fluctuations," is somewhat of an admission that it (with others) controlled prices by artificial means. I know of no law which makes the *steadying of the market* a justification for fixing and maintaining prices by the concerted action of otherwise competing companies, when the effect of steadying the market is to dominate the industry by establishing prices for its products. The perfection of stabilizing prices can be reached only when monopoly is perfect, and as nothing justifies monopoly, I am of the opinion that the stabilizing benefits claimed by the defendants in fixing and maintaining prices are no justification or excuse for what they did. Prices are perfectly stabilized

by pools, when entered into and lived up to, yet no one would contend that a pool, however beneficent its results, is either justifiable or legal. If the establishment of uniform prices for the products of an industry should ever be found advantageous or necessary, such an economic policy should be inaugurated and pursued under authority of law, and not by the will of the industry itself.

Competition with the corporation in all of its products has been real and keen from the date of its organization to the date of the filing of the bill in this suit. About this there is no question, with the possible exception of seamless tubes, which are made under important patents acquired or controlled by the corporation. Every commodity which it made was sold in substantial competition. This is conclusively proved. It is not proved, however, that the competition which existed between the corporation and its competitors extended to prices. While during that period competition was real, it was pursued along levels and at figures agreed upon expressly or tacitly by pools, or at meetings and dinners. At different times when price undertakings and understandings between the corporation and its competitors were broken, notably in 1909, the feature of prices entered into competition, and then competition was complete and without restraint. Otherwise, and at other times, competition was real, but it was restrained as [173] to prices. Therefore, in searching the after-conduct of the corporation for evidence of an intent on its part to monopolize and restrain trade, the participation of the corporation in the old and the new means pursued and devised, by which prices were raised and maintained, demands serious consideration.

Before and at the time of the organization of the corporation, and for several years thereafter, a great many of the companies that became its constituents and subsidiaries were alloting trade and fixing prices for different iron and steel products by pool agreements. It is quite unnecessary in this opinion to discuss the legality of such agreements. It is sufficient to state that it was known by all that they were denounced by the law. With this knowledge, the corporation, through its president, in 1904, commanded its subsidiaries to

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withdraw from pools, yet notwithstanding the policy then announced, certain of its subsidiaries, notably the American Steel & Wire Company, continued in pools formed as late as 1908. It is defended, however, that the participation of the American Steel & Wire Company in the pool last mentioned was without the sanction of the corporation and without the knowledge of its president. It is really unimportant to give consideration to the corporation's claim of exoneration upon this ground, in view of the fact that the corporation itself, with the concurrence of its president at the very same time, at periodical meetings with its competitors, was fixing prices covering a wide range of commodities, not by agreements, but by understandings by which all were morally bound and from which no one deviated without notice to the others. By these methods the corporation and its subsidiary, the American Steel & Wire Company, were contemporaneously and quite as effectually naming and maintaining prices in different products. Measured by the successful results of each, there can be little difference between the methods employed.

When pools and associations were very generally abandoned in 1904, they were succeeded by trade meetings attended by representatives of the same concerns which theretofore had been parties to the pools. At these meetings agreements respecting prices were not made, but understandings were reached with respect to prices which quite as effectually resulted in their maintenance. The legality of these meetings was questioned, and about the year 1907 they were abandoned, and in the same year the Gary dinners were inaugurated.

The Gary dinners were dinners given by E. H. Gary, the president of the corporation, to which were invited representatives of steel-manufacturing concerns which theretofore had participated in the trade meetings, associations, and pools, and which produced "90 per cent or more" of the total output of the diversified products of the steel industry of the country.

The first Gary dinner was given on November 20, 1907, to meet an unquestioned exigency arising out of the panic then existing. The steel industry, like many industries, was

demoralized and threatened with disaster by the panic which began in the month preceding. The dinner was given in order to devise ways and means to prevent calamity to the industry. Ways and means were found which no doubt con- [174] tributed greatly in preventing disaster, not alone to the producers of steel, but also to those intermediate consumers who were carrying large and costly supplies. The ways and means consisted then of nothing more than the urgent request of a strong man that in the stress of panic all should keep their heads and avoid the consequences of reckless cutting of prices. In this the others acquiesced, and in the light of the emergency then existing, and the disaster averted, I am of opinion that the purpose and the conduct of those who participated in the first Gary dinner were not unlawful, improper, or questionable. But after the exigency had passed, and the means to meet it had been exerted, Gary dinners were found to be potential things, and they were afterwards called and employed to exert their potentiality, not in averting disaster, but in creating greater profits by raising and maintaining prices in periods of industrial calm.

Gary dinners, while not regularly held, never adjourned. They were made continuous by the peculiar character of their organization. Being nothing more than business meetings, they were conducted in a business fashion. A general supervisory committee was appointed, and sub-committees were appointed to deal with the different products of the steel industry. These latter committees were known as the Steel Bar Committee, Ore and Pig Iron Committee, Rails and Billets Committee, etc. The membership of each committee was composed of representatives of the leading concerns which manufactured the particular product with which the committee had to do. These committees met between dinners and were accessible, through their chairmen, at all times between meetings. The only difference between the Gary dinners and the meetings of the committees was that at the dinners the general business of the industry was discussed, while at committee meetings the business of a particular branch of the trade was discussed. At neither were agreements made concerning prices at which the partici-

pants would sell their products. In fact, it was asserted and reasserted that such agreements were impossible, because illegal; but in lieu of agreements, the parties, both at the dinners and at the committee meetings, severally made what they chose to call "declarations of purpose"—that is, declarations of the prices at which they respectively proposed to sell their products, to which prices it is testified all adhered until some one chose to deviate therefrom, in which event he was "in decency" bound to notify his dinner associates or the members of his committee.

Excepting the feature of trade allotments and money penalties, Gary dinners were in effect pools, with the right reserved to each participant to withdraw upon notice to the others. They differed from pools only in the difference between the binding force of a moral understanding and the legal obligation of an express agreement. They were pools without penalties. They constituted a scheme which did not make it fatal for a competitor of the corporation to stay out, but made it attractive for him to stay in, the result of which was that prices were maintained with greater uniformity and stability than when the same participants engaged in pool agreements, violations of which carried penalties.

[175] This method of coöperative price regulation was pursued uninterruptedly from November, 1907, to February, 1909. Throughout this time prices were fixed and maintained by "understandings" enforced by "moral obligations." Through the period of depression of 1908, business so decreased in volume that early in 1909 independent producers broke their "understandings" with the corporation and with one another, and sold at prices which each fixed for itself, in complete disregard of previous "understandings." The corporation attempted to maintain for its products prices at the figures understood; that is, to maintain high prices in a period of business depression, and "to force the issue against all economic conditions." It attempted this alone, and in its attempt it failed. Therefore, in that year, the corporation was forced to declare for an "open market"; that is, it sold at prices with respect to which there were no "understandings," and permitted "natural

laws" to take their course. The immediate results were *lower prices* and a *largely increased volume of trade.* If the abandonment by the corporation of its coöperative policy of fixing and maintaining prices "brought out a large volume of business," it logically follows that by the pursuit of that policy "a large volume of business" had theretofore been held back—that is, restrained—and therefore that the policy of coöperation as to prices, based upon mutual understandings and enforced by moral obligations, operated effectually and unduly to restrain trade.

That the corporation did not dominate the industry by compelling the trade to sell at prices it desired is shown by the break of 1909. When the independents broke away, the corporation had to break away, too. When the independents lowered prices, the corporation had to lower prices, too. When they all broke away, two things happened: First, competition *in prices;* second, an increased volume of trade, indicating theretofore a limitation of the former and the restriction of the latter. This is persuasive evidence that the establishment and maintenance of prices from 1901 to 1909 were accomplished by the corporation and its competitors, by keeping agreements made by pools and adhering to understandings reached at meetings and dinners.

Coincident with the breaking of prices by the breaking of understandings made or reached at Gary dinners, Gary dinners were temporarily discontinued. It has been contended all along that Gary dinners had nothing to do with the fixation and maintenance of prices; that while stabilizing prices resulted from such dinners, nevertheless their primary purposes was to secure the establishment and maintenance of good relations between competitors and to afford opportunities for the exchange of trade information and experience. Is it not strange that a breach of an understanding as to the one matter of prices should have caused a discontinuance of the dinners, with the consequent loss of their primary benefits?

Gary dinners were resumed in October, 1909, and with their resumption higher prices were resumed.

By the proceedings at the Gary dinners, and at the meetings of the dinner committees, the fixing and maintaining

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of prices were [176] as successfully accomplished as by meetings called for that purpose during the period from 1904 to 1907, and by the pools created for that purpose from 1901 to 1904. It therefore appears that from the organization of the corporation in 1901 until the Gary dinners were discontinued in January, 1911, the corporation, first by one method and then by a second method and then by a third method, employed means to procure the establishment and maintenance of uniform prices for its diversified products, and by these means the Steel Corporation, with its competitors, did combine and control prices, and in controlling prices restrained trade. If by the three methods pursued, in the three periods named, prices were not artificially and successfully maintained, as shown by the history covering those three periods, I am at a loss to know by what means it would be possible to fix and maintain prices that would unduly restrain trade in the sense of violating the Anti-Trust Law.

The raising and maintaining of prices of steel products from 1901 to 1911 can not be attributed to the dominancy by the corporation over the industry, because of its size. It was due to coöperation between it and nearly all other producers in a joint effort to raise and maintain prices, in which they persisted and succeeded. Without the coöperation of independent producers, prices of steel products could not have been raised and maintained by the corporation alone. The offense of the corporation, therefore, was not its dominancy over the trade, but was an offense precisely similar to that of which every independent and coöperating producer was guilty, and consisted in the act of *combining with its competitors* to produce an unlawful result. If it had not combined with its competitors, or if they had not combined with it, restraint of trade, due to the fixation of prices, would, in my opinion, have been impossible. Therefore those who participated in such meetings, with the intention of doing that which was accomplished, participated in unlawfully restraining trade. I am in no wise convinced that those competing corporations which associated themselves with the Steel Corporation were forced, either by the conduct or the power of the corporation, to coöperate with it in fixing

prices. The corporation produced less than 50 per cent of the steel products of the country. Those of its competitors which participated with it in the fixation of prices produced more than 40 per cent. Those which comprised the 40 per cent could have taken care of themselves, and could have competed with the corporation in prices if they had so desired, and therefore those which comprised the 40 per cent and which coöperated with the corporation in the methods pursued from 1901 to 1911 did so voluntarily and not because of the dominance of the Steel Corporation. The corporation dominated only in the sense of contributing substantially to what was done and making attractive what it desired to be done, and the others yielded cheerfully. Their offense was no different from that of the corporation, and the offense of the corporation was distinguished from theirs only in the leadership it assumed in promulgating and perfecting the policy.

The record does not disclose the names of all the iron and steel [177] producing concerns which were represented at the Gary dinners, and which coöperated in the price-fixing policy there inaugurated and pursued. Those corporations which were of sufficient size and importance to secure representation from time to time upon the principal committee and the sub-committees of the Gary dinners, including the Steel Corporation, its subsidiaries, and its competitors, appear by stipulation (record, volume 9, pp. 3745–3750), which is excerpted in the margin.[a]

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[a] General Committee.—United States Steel Corporation. Competitors: Cambria Steel Company, Pennsylvania Steel Company, Bethlehem Steel Company, Jones & Laughlin Steel Company, Central Iron & Steel Company.

Ore and Pig Iron Committee.—United States Steel Corporation. Competitors: Shenango Furnace Company, Pickands, Mather & Co., Bessemer Pig Iron Association, Republic Iron & Steel Company, Thomas Iron Company, Sloss-Sheffield Iron & Steel Company, Buffalo & Susquehanna Iron Company, Warwick Iron & Steel Company, Allegheny Ore & Iron Company.

Rails and Billets.—Illinois Steel Company, subsidiary. Competitors: Pennsylvania Steel Company, Lackawanna Steel Company, Dominion Iron & Steel Company, Alan Wood Iron & Steel Company.

Woolley, C. J., Concurring.

The Anti-Trust law was enacted "to protect trade and commerce against unlawful restraints and monopolies." The word "trade" means the buying as well as the selling of property, and the statute extends its protection to those who buy as well as to those who sell. A practice that is helpful to the seller, but is hurtful to the buyer, is as fully within the inhibition of the statute as a practice pursued by one seller which unlawfully restrains the trade of another seller. Therefore it may be assumed without discussion, that the statute intends to protect the purchasing public from the consequences of combinations, which, either in their purpose or effect, so raise and maintain prices that trade, in the sense of buying, can not exist except upon terms fixed by combinations of sellers.

When the Steel Corporation and its competitors, which together produce 90 per cent of the iron and steel output of the country, com [178] bined, and first by one method, and then by another, and then still by another, deliberately fixed

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Billets and Sheet Bars.—Carnegie Steel Company, subsidiary. Competitors: Pennsylvania Steel Company, Republic Iron & Steel Company, Lackawanna Steel Company, Jones & Laughlin Steel Company, Youngstown Sheet & Tube Company, Alan Wood Iron & Steel Company.

Structural Material.—Illinois Steel Company, subsidiary. Competitors: Bethlehem Steel Company, Cambria Steel Company, Jones & Laughlin Steel Company.

Plates.—Carnegie Steel Company, subsidiary. Competitors: Cambria Steel Company, Central Iron & Steel Company, Lukens Iron & Steel Company, Worth Bros. Company.

Steel Bars.—Carnegie Steel Company, subsidiary. Competitors: Jones & Laughlin Steel Company, Republic Iron & Steel Company, Crucible Steel Company of America, Cambria Steel Company.

Pipes and Tubular Goods.—National Tube Company, subsidiary. Competitors: Wheeling Steel & Iron Company, Youngstown Sheet & Tube Company, Reading Iron Company, La Belle Iron Works.

Sheets and Tin Plate.—American Sheet & Tin Plate Company, subsidiary. Competitors: La Belle Iron Works, Inland Steel Company, National Enameling & Stamping Company, Youngstown Sheet & Tube Company.

Wire Products.—American Steel & Wire Company, subsidiary. Competitors: Pittsburgh Steel Company, John A. Roebling's Sons Company, Grand Crossing Tack Company.

and successfully maintained almost uninterruptedly for a period of 10 years the prices at which the public was compelled to purchase their products, I am convinced that the corporation and every producer which combined with it and with one another in so fixing and maintaining prices violated the provision of the statute which declares illegal "every * * * combination * * * in restraint of trade or commerce among the several States. * * *"

Fourth. Was the corporation engaged in restraining or monopolizing trade, or was it threatening so to do, at the institution of this suit?

As the several means resorted to by the corporation, with others, for raising and maintaining prices constitute, in my opinion, the only conduct of the corporation violative of the statute, the first part of the question just propounded may be answered by ascertaining when that conduct ceased. The Gary dinner movement ended with the dinner of January 11, 1911, and the bill in this suit was filed on October 26, 1911. The testimony does not show that since the date of the last Gary dinner the corporation, either alone or in coöperation with others, has fixed or maintained prices of the products of the steel industry, or attempted so to do, nor does the testimony disclose anything which suggests an intention on the part of the corporation to return to its former practices. That it may do so, if it desires, unless prevented by the decree of this court, is, of course, obvious.

My conclusions of fact and of law are that the *organizers* of the corporation (1) intended to create a monopoly and to restrain trade, and (2) combined with others and attempted to monopolize trade, within the meaning of the act, and that the *corporation* (1) neither attempted nor possessed the power alone to do the unlawful things intended by its formation, but (2) that it unlawfully combined with others to restrain trade by controlling prices.

[10] Whatever remedy there my be against the organizers of the corporation for acts violative of the statute, certainly in this proceeding in equity a decree of dissolution cannot be awarded against the corporation for the unlawful intent and the unsuccessful attempt of its organizers to violate the law.

Syllabus.

Upon the finding that the corporation, in and of itself, is not now and has never been a monopoly or a combination in restraint of trade, a decree of dissolution should not be entered against it. Having found, however, that the corporation violated one of the provisions of the statute by combining with others to unduly restrain trade, and that it possesses the power to again unlawfully combine with others to do the same unlawful acts, and though not actively threatening, yet because of the disposition displayed throughout the larger portion of its history, it may again do so, I am of opinion, that the corporation should be prevented doing the things and repeating the practices respecting the fixing and maintaining of prices herein viewed illegal. The ordinary relief, obviously, is the injunction process of the court, which, in an ordinary situation, would follow such a finding as of course. I am satisfied, however, that the same end will be attained, in a manner consistent with recent legislation, by retaining jurisdiction of the bill, if desired by the Government, for the purpose [179] of restraining the defendants against engaging in the price fixing practices found illegal.

Having stated the reasons for my conclusions, and the matters which have principally controlled my judgment in this case, I join in the decree to be entered.

FORD MOTOR CO. *v.* UNION MOTOR SALES CO. ET AL.

(District Court, S. D. Ohio, W. D. December 4, 1914.)

[225 Fed. Rep., 373.]

PATENTS 216—RIGHTS OF PATENTEE—PRICE RESTRICTION ON RESALE OF PATENTED ARTICLE.—Where the owner of a patent sells a machine made by him thereunder, and receives therefor the full price asked, and all that he expects to receive, he has fully exercised the exclusive right to sell given him by the patent laws, so far as relates to the particular machine sold, and can not legally fix the price at which it may be resold by the purchaser.*

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 329; Dec. Dig. 216.]

Opinion of the Court.

PATENTS 216—SALE OF PATENTED ARTICLE—CONTRACTS RESTRICTING PRICE ON RESALE—VALIDITY.—Complainant manufactures automobiles under its own patents and sells the same to dealers, receiving therefor the prices it has fixed; but by contracts with such dealers it is provided that the machines will be [874] resold by them at complainant's full advertised list prices only, and that a violation of such provision shall constitute an infringement of the patents, subject the dealer to the payment of a fixed sum as damages, and authorize a cancellation of the contract; also that title to the particular machine or machines so sold shall revert to complainant. There is a further provision reserving title in complainant until full payment of the purchase price. *Held*, that such a contract is one of sale of the machines, and not of the right to sell; that on full payment of the purchase price of a machine it passes beyond the patent monopoly; and that in so far as the contract attempts to fix the price at which only it may be sold thereafter it is illegal, as in restraint of trade and unenforceable.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 329; Dec. Dig. 216.]

In Equity. Suit by the Ford Motor Company against the Union Motor Sales Company, Lucien A. Soward, J. Carl Horton, Earl Saunby, and William T. S. Yocum. Decree for defendants.

Lucking, Helfman, Lucking & Hanlon, of Detroit, Mich., *and Alfred M. Allen*, of Cincinnati, Ohio, for complainant.

Judson Harmon, of Cincinnati, Ohio, for defendants.

HOLLISTER, District Judge.

The complainant, Ford Motor Company, a manufacturer of automobiles under its own patents, seeks by this suit to restrain the defendants from representing that they can, or will, procure for sale Ford automobiles at a price less than the regular price list of the complainant; from conducting, or attempting to conduct, any business in Ford automobiles; from infringing directly, or indirectly, the complainant's patents or "license restrictions and price restrictions"; from combining among themselves, or with others, to infringe complainant's patents by breaking its price restrictions; from conspiring with any of complain-

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ant's "dealers-licensees or sub-dealers-licensees or salesmen"; from procuring or obtaining any Ford automobiles at less than the complainant's list prices; and from interfering with the complainant's business, or with the business of any of its "dealers-licensees or sub-dealers-licensees."

It was proved that defendants obtained Ford machines from a dealer or dealers, and sold them and advertised them for sale at less than complainant's regular price list. The rights of the parties depend upon the construction to be given the written contracts entered into between the complainant and its so-called "dealers-licensees." No case involving a contract precisely like the agreement between the complainant and the dealers who sell the cars made by it, and covered by its patents, has been presented to the Supreme Court. An agreement by a patentee giving to another a license to manufacture under the patent and to sell at a fixed price on a small royalty has been held not to come within the condemnation of the Sherman Anti-Trust Act (act July 2, 1890, c. 647, 26 Stat. 209). *Bement* v. *Harrow Co.*, 186 U. S. 70, 22 Sup. Ct. 747, 46 L. Ed. 1058. It is conceded that contracts, such as made by the complainant in this case with its dealers, would, were it not for the fact that the article sold was made by the complainant under its patents, be contrary to public policy [875] under the decision in *Dr. Miles Medical Co.* v. *Park*, 220 U. S. 373, 31 Sup. Ct. 376, 55 L. Ed. 502. It is claimed, however, that since the complainant manufactures its cars under its own patents it has the right to maintain its monopoly of the exclusive right to sell, granted by the patent laws, by a contract of sale with its dealers fixing the price on resale at which the dealers may sell to the user, although by so doing the competition between its dealers is thereby effectually prevented.

The contract in this case and the license contract to which the Supreme Court have given their approval are not in terms the same. If they involved the same principles, the conclusion must necessarily be that the contract involved here is neither contrary to public policy nor in contravention of the Anti-Trust Act, because the patentee, having the

exclusive right or monopoly to sell, has by this contract only exercised the right given him by the patent laws of the United States. There is, however, a marked difference in the facts, for in this case the patentee is the maker and does not receive a royalty, but actually sells each machine for a price fixed by itself, and is paid by the dealer all that the maker asks for the article sold. There is no question of use, or restricted use, in this case, as in *Henry* v. *Dick*, 224 U. S. 1, 32 Sup. Ct. 364, 56 L. Ed. 645, Ann. Cas. 1913D, 880, for the contract is either a complete sale of the exclusive right to sell, given the complainant by the patent laws, or a license to sell, which involves a reservation of some part of the exclusive right to sell, or, as contradistinguished from these, amounts to a sale by the patentee itself.

[1] For the purposes of this case it may be assumed that if the contract partakes of the quality of a sale of the exclusive right to sell, or of a license to sell, it is a good contract, which the complainant may legally enter into with its dealers, and, under the facts proved in this case, an injunction must issue against the defendants. But if, under the terms of the contract, the complainant has sold the automobiles made by it and delivered the same to its dealers, passing the title upon receipt of the contract price, then, under the decisions of the Supreme Court and on principle, the conclusion, in my judgment, must be that by such sale the complainant has exercised its exclusive right to sell, so far as the particular commodity sold is concerned, and can not legally fix the price at which the dealer shall resell. The contract does not deal with the use of the automobile sold. Hence to call it a contract for "restricted use" is a misnomer, and the adoption of such a definition is, as said by Mr. Justice Day, "a mere play upon words." *Bauer* v. *O'Donnell*, 229 U. S. 1, 16, 33 Sup. Ct. 616, 619, 57 L. Ed. 1041, 50 L. R. A. (N. S.) 1185, Ann. Cas. 1915A, 150.

Counsel for the complainant say that the sale is conditional; that it is a restricted sale, and that it is a license to sell on condition. It is immaterial what the contract may be called, but its purpose and effect must be ascertained. Before proceeding to that end it may be well to consider

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what it is a patentee gets by the statutes which embody every right acquired by him. It was said in *Adams* v. Burks, 17 Wall. 453, 456, 21 L. Ed. 700:

[376] "The right to manufacture, the right to sell, and the right to use are each substantive rights, and may be granted or conferred separately by the patentee."

Perhaps as strong an illustration of the right of the patentee to qualify or restrict the use to which, upon sale, the patented article may be put, is shown in the case of *Henry* v. *Dick*, 224 U. S. 1, 32 Sup. Ct. 364, 56 L. Ed. 645, Ann. Cas. 1913D, 880. This went so far as to hold that the patentee of a machine, which in its operation involved other articles, could limit its use to such other articles furnished by himself, though they themselves were not patented, and that he could do this by a mere notice upon the machine itself, which was binding upon a third person, who, with knowledge of the notice, sold such other articles to the vendee for use upon the machine, and who, by so doing, became a contributory infringer. The patentee, having the exclusive right to use, which contemplates the entire use, may sell the entire use, or sell a part of it only, or sell on condition of use in a particular way. It necessarily follows from these decisions that he may restrict, or qualify, his exclusive right to make or sell.

The question in this case is whether or not the patentee, having the exclusive right to sell, has, by these contracts, conferred that right, either wholly or in part, or has done something else which is of such character as to involve other rights vested by the common law or statute in the public; for, while the patentee has the "*exclusive* right to make, use, and vend the thing patented, and consequently to prevent others from exercising like privileges without the consent of the patentee" (*Bauer* v. *O'Donnell*, 229 U. S. 1, 10, 33 Sup. Ct. 616, 617, 57 L. Ed. 1041, 50 L. R. A. [N. S.] 1185, Ann. Cas. 1915A, 150, citing *Bloomer* v. *McQuewan*, 14 How. 539, 549, 14 L. Ed. 532, and *Continental Paper Bag Co.* v. *Eastern Paper Bag Co.*, 210 U. S. 405, 425, 28 Sup. Ct. 748, 52 L. Ed. 1122), yet, if what the complainant has done, or attempted to do, by these contracts with its dealers,

amounts to something more than the exercise of the exclusive right to sell, it has, by such act, added to and extended its exclusive right to sell, and has thereby brought itself within the condemnation of rules and laws established and enacted for the protection of the public against monopolies and contracts in restraint of trade. This a patentee can not do, because, while the purposes in granting these rights to the inventor should, as said by Mr. Justice Day in the *Sanatogen case*, 229 U. S. 1, 10, 33 Sup. Ct. 616, 617, 57 L. Ed. 1041, 50 L. R. A. (N. S.) 1185, Ann. Cas. 1915A, 150, "be fairly or even liberally construed; yet, while this principle is generally recognized, care should be taken not to extend by judicial construction the rights and privileges which it was the purpose of Congress to bestow." And he says further (229 U. S. 11, 33 Sup. Ct. 617, 57 L. Ed. 1041, 50 L. R. A. [N. S.] 1185, Ann. Cas. 1915A, 150):

"Recognizing that many inventions would be valuable to the inventor because of sales of the patented machine or device to others, it granted also the exclusive right to vend the invention covered by the letters patent. To vend is also a term readily understood and of no doubtful import. Its use in the statute secured to the inventor the exclusive right to transfer the title for a consideration to others. In the exclusive rights to make, use, and vend, fairly construed, with a view to making the purpose of Congress effectual, reside the extent of the patent monopoly under the statutes of the United States."

[377] Regard must be had to the nature of the article dealt with in the contract. It was settled long ago that when a patentee sells the patented article, which is valuable only for the use to which it may be put, he receives the consideration for its use and parts with the right to restrict the use. An automobile has value only in its use, and if the inventor, who is also the manufacturer, sells it for such price as pleases him, without restrictions on the use, he will have exercised his exclusive right to sell. It was said by Mr. Justice Miller in *Adams* v. *Burke*, 17 Wall. 453, 456, 21 L. Ed. 700:

"But in the essential nature of things, when the patentee, or the person having his rights, sells a machine or instrument whose sole value is in its use, he receives the consideration for its use and he parts with the right to restrict that use. The article, in the language of the court, passes without the limit of the monopoly. That

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is to say, the patentee or his assignee having in the act of sale received all the royalty or consideration which he claims for the use of his invention in that particular machine or instrument, it is open to the use of the purchaser without further restriction on account of the monopoly of the patentees."

But if it is urged that in *Henry* v. *Dick* the patentee really received upon the sale of the patented article the price he asked, the title passing, and was therefore no longer concerned with the use to which the article might be put, upon the principle of the case just cited, it will be sufficient to call attention to a part of the language of Mr. Justice Day in the Sanatogen case, when stating what the decision in the case of *Henry* v. *Dick* was (229 U. S. 14, 15, 33 Sup. Ct. 619 [57 L. Ed. 1041, 50 L. R. A. (N. S.) 1185, Ann. Cas. 1915A, 150]):

"It is expressly stated in the opinion that the machine was sold at cost or less and that the patentee depended upon the profit realized from the sale of the non-patented articles to be used with the machine for the profit which he expected to realize from his invention." And "While the title was transferred, it was a qualified title, giving a right to use the machine only with certain specified supplies."

It would seem that the decision in *Henry* v. *Dick* should be regarded as applying to the particular facts involved in the case, and not as the declaration of a principle. Indeed (as Mr. Justice Day shows), in the opinion in that case Mr. Justice Lurton distinguishes the case from *Bobbs-Merrill* v. *Straus*, hereinafter referred to, by saying (224 U. S. 47, 32 Sup. Ct. 379 [56 L. Ed. 645, Ann. Cas. 1913D, 880]):

"There is no collision whatever between the decision in the Bobbs-Merrill case and the present opinion. Each rests upon a construction of the applicable statute and the special facts of the cases."

One can not fail to notice also Mr. Justice Day's remarks about the Bement case, which complainant cites as conclusive authority for the propriety of its contract. Among other things, he says (229 U. S. 14, 33 Sup. Ct. 618 [57 L. Ed. 1041, 50 L. R. A. (N. S.) 1185, Ann. Cas. 1915A, 150]):

"The case was one arising upon license agreements, originating in a State court, and did not involve the construction of the patent act in the circumstances now disclosed."

—language which would seem to indicate that no principle was intended to be announced in that case different from the long-established [378] rule that, when the patentee of the article had received upon sale his price, the article being valuable to the purchaser because of its use, it passed beyond the limits of the patentee's monopoly.

The facts here show no license, no sale of the exclusive right to sell, no sale in which the patentee looks to his profits in future sales, or in any use to which the article sold may be put by its purchaser. There seems to me no doubt about this. Therefore, there being no restrictions in the contract of sale upon the use, as there were in the case of Henry v. Dick, has the complainant, by selling the article to the dealer, receiving all for it that he ever will receive, and the price being satisfactory to him, exercised, with respect to the machine sold, the exclusive right to sell granted to him, bearing in mind what the article is and the usual attributes of a sale of a chattle?

[2] In the contract in question, the so-called "dealer-licensee" is given a restricted right to use and vend, within certain described territory, automobiles made by the patentee, is required to estimate the number of cars "that he will purchase" from the patentee in each of the various months covered by the agreement, and upon failure to purchase the agreed upon number the patentee had the right to cancel the agreement. Each machine is sold by the patentee at a discount of 15 per cent of its current advertised list price, "and will be resold by the dealer-licensee in the above-described territory only, at the manufacturer-licensor's full advertised list prices only, current at date of sale. * * *". The dealer-licensee agrees not to—

"do or permit any act whatsoever either directly or indirectly or through another party, as would directly or indirectly have the effect of reducing the said current advertised list prices of Ford automobiles, * * * and in the event of a breach, violation, or infringement of the provisions of this clause the manufacturer-licensor shall have the right at its option to immediately terminate this agreement, but in any event, the dealer-licensee shall pay to the manufacturer-licensor the sum of two hundred fifty dollars ($250.00) for every such breach, violation, or infringement, such sum being the agreed damage the manufacturer-licensor will sustain."

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Provision is made for a rebate of certain percentages on the net amount of resales made. It was agreed that the dealer-licensee should be restricted, not only to the territory specified in the agreement, but, on resale, to the price—

"made at the current advertised Ford list prices, * * * and that any violation of such territorial or price restrictions shall be and constitute an infringement of such Ford patents and each of them; and, in addition thereto, it is also agreed that in case of any such infringement or breach of such restrictions, or any of them, the title to the particular car or cars sold in violation of such restrictions, or any of them, shall at once revert to the Ford Motor Company. The foregoing provisions are in addition to all other remedies and damages and penalties herein provided for."

This provision is also found:

"It is expressly agreed that the legal title to all automobiles sold or delivered by the manufacturer-licensor to the dealer-licensee hereunder shall be and remain in the manufacturer-licensor until the full purchase price thereof * * * shall be paid in money to the credit of the manufacturer-licensor, * * * with full and complete power and authority hereby vested in said manufacturer-licensor, in case of default in payment of money by the dealer-licensee, regardless of how the amount thereof may be evidenced, to retake, [879] with or without process of law, into its custody and possession said automobiles and the same permanently retain, and all liability from said manufacturer-licensor to said dealer-licensee on the contract for the sale and delivery of such automobiles, shall in such case cease and terminate."

The contract is of great length, with many provisions; but these seem to be sufficient to present the question with which we are concerned. This reservation of title is a familiar method of securing the purchase money, but when the purchase money is paid the title passes. This is recognized by the contract itself, in providing that upon a resale by the dealer at less than the complainant's list price, the title shall revert to the complainant. It is quite clear that this is not an agreement to pay royalties, for the patentee actually sells the automobile manufactured by it at a price satisfactory to it. No matter how many machines the dealer-purchaser sells to users, the manufacturer-patentee receives on each machine the entire sum for which he is willing to part with it and to transfer title.

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If a patentee sells a machine made by him under his patents, and obtains for it all he asks, what further rights has he under the patent laws? Having the exclusive right to sell, he sells and gets his price. With respect to the machine sold he has exercised his right to sell. It was said in *Chaffee* v. *Belting Co.*, 22 How. 217, 223; 16 L. Ed. 240:

"When the patented machine rightfully passes to the hands of the purchaser from the patentee, or from any other person by him authorized to convey it, the machine is no longer within the limits of the monopoly. According to the decision of this court in the cases before mentioned, it then passes outside of the monopoly, and is no longer under the peculiar protection granted to patented rights. By a valid sale and purchase, the patented machine becomes the private individual property of the purchaser, and is no longer protected by the laws of the United States, but by the laws of the State in which it is situated."

There is a difference between an agreement conveying the exclusive right given by the patent laws to sell the patented article and a sale by the patentee of the article itself. In the one case, the patentee grants the right to sell. In the other, he himself sells. If he grants to another the right to sell, then he has parted with the exclusive right he had under the patent laws. No doubt he could make such a grant for a lump sum, large or small, as he chose, or take his pay on a fixed royalty or percentage on sale; and, under the *Bement case*, 186 U. S. 70, 22 Sup. Ct. 747, 46 L. Ed. 1058, he might fix the price at which his vendee of the right could sell. But, having the exclusive right to sell, these methods of payment for the right and the restrictions as to price of sale would be but qualifications and conditions upon which the right to sell was granted. If the patentee's right to sell was transferred on condition that the transferee of the right could sell the article itself only at a price fixed by the patentee, it might be said the right conveyed was not complete, but was qualified and conditional, and this would be coming very close to the Bement case.

It seems to me that there is confusion in the minds of many between this exclusive right to sell the patented article granted by the manufacturer-patentee, and a sale of the article itself by the manufacturer-patentee. If the patentee

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himself makes a sale of the article made by [880] him under the patent, and gets his price, the transaction partakes of all the characteristics of a sale of a chattel. If he sells only the right to sell the article, he may retain something of the complete right he has by restricting the terms under which sales may be made. If he makes no such restrictions, then, of course, the grantee of the right may himself fix the price at which sales shall be made by him.

This contract does not give the vendee the right to sell. It sells to him the article and attempts to give him the right to resell. He buys. The manufacturer-patentee sells the product to him and then seeks to control the price at which he shall resell. If, upon payment by the dealer of the purchase price, the title of the machine passes to him, how can it be taken away because the user to whom the dealer has sold has paid a less price than the list price? See opinion of Judge Ray in *Waltham Watch Co.* v. *Keene* (D. C.), 202 Fed. 225, 234, et seq.

There are cases sustaining such contracts as these, all of which were decided prior to the Sanatogen case. In *National Phonograph Co.* v. *Schlegel* (C. C. A. 8th), 128 Fed. 733, 64 C. C. A. 594, the decision is squarely to the point, and was written by Judge Van Devanter, who now, as Justice of the Supreme Court, dissents from the decision of the majority in the Sanatogen case. And it is quite significant that Judge Denison, then of the district court, in *Edison* v. *Smith Mercantile Co.* (C. C.), 188 Fed. 925, while upholding such a contract under the authorities as they existed at that time, said (page 926):

"Several courts have recognized a tendency to go too far in sanctioning such conditions, and some recent decisions in the Second Circuit, as well as the opinions of the Supreme Court in the *Bobbs-Merrill case*, 210 U. S. 339 [28 Sup. Ct. 722, 52 L. Ed. 1086], * * * and the *Dr. Miles case*, 220 U. S. 373 [31 Sup. Ct. 376, 55 L. Ed. 502], * * * and the granting of the pending certiorari in the *Dick case*, 224 U. S. 1 [32 Sup. Ct. 364, 56 L. Ed. 645, Ann. Cas. 1913D, 880], * * * have tended to indicate that some limits will be placed upon the now customary practice."

What that learned judge would have done, if the Sanatogen case had been decided, cannot, of course, be said; but it is

evident he felt constrained to the conclusion he reached by the decisions theretofore rendered.

Judge Hazel, in *Ford Motor Co.* v. *International Automobile League et al.* (D. C.), 209 Fed. 235, draws the conclusion that the principle enunciated in the Sanatogen case and in *Bobbs-Merrill* v. *Straus* was applicable to these very contracts, assuming that the dealers, who sold to the defendants in that case, "were the full owners thereof, having paid for the same in accordance with the terms of the license, and therefore were not merely in possession under the ordinary conditional contract of sale."

So far as appears in the case under consideration here, the dealers, from whom the defendants purchased, had paid the complainant for the cars; but whether they had or not seems to me of no consequence, because, when the purchase price was paid to the complainant, the title passed to the dealer, as said hereinbefore. That such contracts as these would not now be sanctioned seems quite clear from the views of the [881] majority of the Supreme Court expressed in the *Sanatogen case*, 229 U. S. 1, 33 Sup. Ct. 616, 57 L. Ed. 1041, 50 L. R. A. (N. S.) 1185, Ann. Cas. 1915A, 150. In that case the Bauer Chemical Company was the sole agent and licensee for the sale of an albuminoid known as "Sanatogen," covered by letters patent of the United States. The agreement provided that the agent and licensee should have power to fix the price of sale to wholesalers, distributors, retailers, and the public, the product to be furnished the Chemical Company at manufacturer's cost, and the net profits to be divided equally by the parties. On each package was the following:

"NOTICE TO THE RETAILER.

"This size package of Sanatogen is licensed by us for sale and use at a price not less than one dollar ($1.00). Any sale in violation of this condition, or use when so sold, will constitute an infringement of our patent No. 601,995, under which Sanatogen is manufactured, and all persons so selling or using packages or contents will be liable to injunction and damages.

"A purchase is an acceptance of this condition. All rights revert to the undersigned in the event of violation.

"THE BAUER CHEMICAL CO."

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The proprietor of a drug store purchased for his retail trade from the Bauer Company original packages of Sanatogen bearing that notice. He sold them at retail at less than $1, and, without the license or consent of the Bauer Company, purchased from jobbers, who had theretofore purchased from the Bauer Company, original packages of Sanatogen with the notice affixed, and sold them at retail at less than the price fixed in the notice, and expressed the intention of continuing such sale. The question for decision by the Supreme Court was: May a patentee by notice limit the price at which future retail sales of patented articles may be made; such articles being in the hands of a retailer by purchase from a jobber who has paid to the agent of the patentee the full price asked for the article sold?

I have already referred to some of the remarks of Mr. Justice Day in that case. He discussed the decision in *Bobbs-Merrill Co.* v. *Straus*, 210 U. S. 339, 28 Sup. Ct. 722, 52 L. Ed. 1086. There the owner of a copyright of a book undertook to limit the price of the book for sale at retail by a notice on each book fixing the price at $1, stating that no dealer was licensed to sell for less, and that a sale at a less price would be treated as an infringement of the copyright. The Supreme Court decided that the copyright statute, in securing to the holder of the copyright the sole right to vend copies of the book, conferred a privilege which, when the book was sold, was exercised by the holder, that the right secured by the statute was thereby exhausted, and that the owner of the copyright could not, by a mere notice, fix such a limitation of price on resale, as was attempted in that case. Mr. Justice Day applied the principle of that case to a notice on a patented article, interpreting the right to vend in the copyright statute and in the patent statute as the same.

While in each of these cases the court limited its decision to the facts in each, and denied the right by a holder of a copyright and the patentee of a patented article, after receiving the price at which he was willing to sell the book in the one case and the patented article in the [383] other, and did sell, to fix, by a mere notice on the book or patented

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article, the price for future sales of the same, and expressly withheld an expression of opinion upon the effect of fixing the price for resales by the vendee in case of license or contract covering copyrighted articles in the one case and patented articles in the other, yet the language in each of these cases points directly to the view that when the patentee of a patented article sells the article made by him under the patent for a price at which he is willing to sell, and receives the price, he has, as to that article, received all to which he is entitled under the patent laws. That principle underlies these decisions.

The conclusions in the Bobbs-Merrill case and the Sanatogen case were the result of a construction by the court of the copyright and the patent statutes; that is to say, involved a determination of what rights are conferred by those laws. As I read those decisions, the court say (quite irrespective of the difference, if there is any, between fixing the price for future sales by the vendee by notice on the article, or by contract of which third persons have knowledge) the right in a patentee to sell the patented article itself is, in either case, exhausted when he sells the article and has received his price.

But is there any difference between an attempt to fix the price of future sales by notice, and an attempt to fix the price by contract? A notice is effectual to bind the one who receives it, when he takes the article to which it is attached with knowledge of the condition. *Railroad* v. *Fraloff*, 100 U. S. 24, 27, 25 L. Ed. 531; *The Majestic*, 166 U. S. 375, 384, 17 Sup. Ct. 597, 41 L. Ed. 1039; *Gaines* v. *Transportation Co.*, 28 Ohio St. 418.

The license in the *Dick case*, 224 U. S. 1, 32 Sup. Ct. 364, 56 L. Ed. 645, Ann. Cas. 1913D, 880, read:

"This machine is sold by the A. B. Dick Co. with the license restriction that it may be used only with the stencil paper, ink, and other supplies made by A. B. Dick Company, Chicago, U. S. A."

The defendant, and the purchaser who sold to her a can of ink made by some other than the A. B. Dick Co., both had knowledge of the restriction attached to the machine. It

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was there said by Mr. Justice Lurton (224 U. S. 12, 32 Sup. Ct. 365 [56 L. Ed. 645, Ann. Cas. 1913D, 880]):

"It is not denied that she accepted the machine with notice of the conditions under which the patentee consented to its use. Nor is it denied that thereby she agreed not to use the machine otherwise."

And in the Sanatogen case, in the notice fixing the price was printed:

"A purchase is an acceptance of this condition. All rights revert to the undersigned in the event of violation."

There can be no doubt that the defendant in that case knew of the condition and attempt to impose the restriction upon him; for, in the certified facts, it appears he sold the Sanatogen at less than the price fixed in the notice, and averred that he would continue such sales.

If the patentee's exclusive right to sell is exhausted by a sale, the Supreme Court say he can not, by a mere notice attached to the patented [383] article, though brought home to the purchaser, add to or extend his right by fixing the price at which his vendee shall sell the same article. It must therefore be true that if the patentee had, by a sale of the article and the receipt of his price for it, passed the title to another, he can not enlarge or extend that right by contract, or in any other way, for he has parted with what he had. And when he seeks to fix the price at which his vendee shall sell, he brings into operation other laws and policies which conflict with such attempts—rules against restraints on alienation; the common law against restraints of trade and monopolies, and the Sherman Anti-Trust law against contracts, conspiracies, and combinations to restrain trade, and to monopolize or attempt to monopolize the same. When the complainant sold an automobile under one of these contracts, and received the price, the title passed to the purchaser, and no sale by the purchaser to another could cause a reverter of the title to the complainant; for, in the complete exercise of his right to sell, he sold, and the subject of sale passed without the limits of the monopoly.

The Supreme Court in *Standard Sanitary Mfg. Co. v. United States*, 226 U. S. 20, 33 Sup. Ct. 9, 57 L. Ed. 107, held that a trade agreement involving the right of the parties

to it to use a certain patent, which transcends what is necessary to protect the use of the patent or the monopoly conferred by law, and which controlled the output and price of goods manufactured by all who use the patents, was illegal under the Anti-Trust act of 1890. It was said in that case by Mr. Justice McKenna (226 U. S. 49, 33 Sup Ct. 15 [57 L. Ed. 107]):

> "Rights conferred by patents are indeed very definite and extensive, but they do not give any more than other rights an universal license against positive prohibitions. The Sherman law is a limitation of rights, rights which may be pushed to evil consequences, and therefore restrained."

The purpose of complainant's contracts with its dealers is to prevent competition between its dealers, each of whom has paid it all it asked. The vice in them is that the patent law does not confer power on the patentee to prevent competition among those who have purchased the patented article from him. I am therefore of opinion that these contracts (the opinion being restrained to the facts in this case) are invalid, and that the defendants in causing them or attempting to cause them to be broken, have done the complainant no wrong cognizable by the law.

An order may be taken dismissing complainant's bill, at its costs.

THORBURN v. GATES.

(District Court, S. D. New York. July 17, 1915.)

[225 Fed. Rep. 613.]

MONOPOLIES 28 ANTI-TRUST ACT—CIVIL ACTIONS—SERVICE—VENUE.—The provision in Anti-Trust act July 2, 1890, c. 647, § 7, 26 Stat. 210 (Comp. St. 1913, § 8829), that any person injured in his business or property by any other person or corporation, by reason of anything forbidden or declared unlawful by the act, may sue therefor in any Circuit Court in the district in which defendant resides or is found, merely removes the existing limitations on the venue of actions between diverse citizens, and permits plaintiff to sue defendant wherever he can serve defendant with process good where executed.*

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 18; Dec. Dig. 28.]

Syllabus.

EXECUTORS AND ADMINISTRATORS 525—FOREIGN EXECUTOR—RIGHT TO SUE.—An executor may not, in the absence of statute authorizing it, be sued outside of the State granting his letters.

[Ed Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 2344–2349; Dec. Dig. 525.]

EXECUTORS AND ADMINISTRATORS 1—NATURE OF PROCEEDINGS—"EXECUTOR."—The subject of administration of estates of decedent is in rem, and an "executor" is only an official charged with the duties of management and distribution, regardless of whether he is vested with title or whether the obligation to pay debts is personal.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1½; Dec. Dig. 1.

For other definitions, see Words and Phrases, First and Second Series, Executor.]

[614] CONSTITUTIONAL LAW 305—DUE PROCESS OF LAW—JURISDICTION OF FEDERAL COURTS.—A State may, as to goods within its own jurisdiction, provide that a foreign executor shall be its own representative, and that process served on him within its borders shall be effective to determine the disposition of such goods; but since the fourteenth amendment a jurisdiction conflicting with the exclusive authority of the State appointing the executor should be disregarded at the outset, at least in a Federal court.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 925–927; Dec. Dig. 305.]

CONSTITUTIONAL LAW 48—CONSTRUCTION OF STATUTES—CONSTRUCTION IN FAVOR OF VALIDITY.—Where a statute may be so construed as will render it valid, such construction should be adopted.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 46; Dec. Dig. 48.]

EXECUTORS AND ADMINISTRATORS 525—ACTIONS AGAINST FOREIGN EXECUTORS—JURISDICTION—STATUTORY PROVISIONS.—Code Civ. Proc. N. Y. § 1836a, providing that a foreign executor may be sued in any court in the State in his capacity of executor under like restrictions as a non-resident may be sued, must be construed as opening the courts of New York to suits against foreign executors in cases where the law of the domiciliary State allows it.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 2344–2349; Dec. Dig. 525.]

EXECUTORS AND ADMINISTRATORS 525—ACTIONS AGAINST FOREIGN EXECUTOR—JURISDICTION OF FEDERAL COURT.—In an action at law under Anti-Trust Act, § 7, brought against the executrix of decedents jointly charged with the wrongful acts resulting in damage to plaintiff, service of summons on the executrix, a resident of Texas and appointed by the proper court of Texas, which was the residence and citizenship of the decedents, made while she was sojourning in New York, is not authorized by Code Civ. Proc. N. Y.

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§ 1836a, authorizing a foreign executor to be sued in like manner and under like restrictions as a non-resident may be sued.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 2344-2349; Dec. Dig. 525.]

At law. Action by Robert H. Thorburn against Dellora R. Gates, as executrix. On motion to quash service of summons. Granted.

Motion to quash the service of a summons in an action at law under section 7 of the Sherman Act. The defendant is executrix of two deceased persons, who are charged jointly with the wrongful acts which resulted in damage to the plaintiff. She is a resident of Texas. The two decedents were Texans by residence and citizenship. She was appointed executrix by the proper Texas courts, who had probated the wills and are assuming administration of the two decedent estates. The summons was served in New York while the defendant was actually sojourning there. Section 1836a of the Code of Civil Procedure of New York is as follows:

An executor or administrator duly appointed in any other State, Territory, or District of the United States, or in any foreign country, may sue or be sued in any court in this State in his capacity of executor or administrator in like manner and under like restrictions as a non-resident may sue or be sued, if, within twenty days after any such executor or administrator shall commence, or appear in, any action or proceeding in any court in this [615] State or within twenty days after he shall be required or directed by summons or otherwise to appear therein, there shall be filed in the office of the clerk of the court, in which such action or proceeding shall be brought or be pending, a copy of the letters testamentary or letters of administration issued to such executor or administrator duly authenticated as prescribed by section 2704 of the code of civil procedure; in default whereof all proceedings in such action or proceeding may be stayed until such duly authenticated copy of such letters shall be so filed.

Franklin W. M. Cutcheon and *A. L. Humes*, both of New York City, for the motion.

John S. Wise, Jr., of New York City, opposed.

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LEARNED HAND, district judge (after stating the facts as above).

[1] Section 7 of the Sherman Act, in providing that the defendant may be served where "found," did not intend to extend the scope of the process of this court. It meant to remove the existing limitations upon the venue of actions between diverse citizens and to permit the plaintiff to sue the defendant wherever he could catch him with a process good where it was executed. In this respect it differs from the provisions of the Clayton Act (act Oct. 15, 1914, c. 321), § 12, 38 Stat. 736, which gives a wider scope to the process itself. The validity of the service of this process, therefore, gains nothing from the fact that the action arises under section 7 of the Sherman Act, but is to be judged quite as though it had been an ordinary civil action before the venue of suits between diverse citizens had been limited to the districts of the parties' residence.

[2] Everybody agrees that without the aid of a statute a foreign executor might not be sued outside of the territory of the sovereign who granted his letters. This was already so well established in 1841 that Mr. Justice Story thought it unnecessary to cite much authority upon the point. *Vaughan* v. *Northrup*, 15 Pet. 1, 5, 10 L. Ed. 639; *Lewis* v. *Parrish*, 115 Fed. 285, 53 C. C. A. 77. The doctrine implies that the devolution of both rights and obligations, effected by the decedent's appointment and the grant of letters, is not regarded as intended for more than purposes of local administration and distribution. A gift causa mortis, a specific bequest after assent by the executor, an inherited freehold, a devise, each of these gives a title which will be recognized in other jurisdictions, because they are intended to have such an effect where they occur, and other States recognize the legal results within their own borders of what has taken place elsewhere. Such might have been equally well the view taken of the rights or obligations of the executor. As hæres factus of the Roman law, from whom he is descended, he might have had the same status as the heir at law actually obtained, and the title and obligation cast upon him might have been regarded as effecting a sub-

stitution to be recognized everywhere. Indeed, the executor has title, and the judgment against him was always regarded as personal (*Stacy* v. *Thrasher*, 6 How. 44, 60, 12 L. Ed. 337), even though the executor had the defense of plene administravit, and though his actual liability was upon the theory that he had assets in his hands, or had committed a a devastavit. Had it not been for the interposition of the ordinary, it is possible that an execu[616]tor might have become an heir somewhat as the heir at law; but since the Ordinary assumed always to grant letters of administration, the whole execution of the office became in some sense a public duty, finally conceived as resting wholly in the hands of the State which first undertook it. The unwillingness of other States to entertain such suits seems to be explicable only upon this interpretation of the grant of letters.

[3,4] I therefore regard the doctrine as having for its necessary corollary that the whole subject of administration is in rem (*Jefferson* v. *Beall*, 117 Ala. 436, 23 South. 44, 67 Am. St. Rep. 177), and that the executor is only an official charged with the duties of management and distribution, regardless of whether he be vested with title or whether the obligation to pay debts be personal. These are perhaps concessions to his historical evolution, which have now ceased to indicate existing notions. Section 1836a of the Code of Civil Procedure of New York must be read in the light of these general ideas regarding the status of executors. No doubt the State of New York, as respects goods situated within its own jurisdiction, might provide that an executor appointed elsewhere should be its own representative, and that process served upon him within its own borders should be effective to determine the disposition of all such goods. *Stacy* v. *Thrasher*, supra; *McLean* v. *Meek*, 18 How. 16, 15 L. Ed. 277. Yet if it attempted to go further than this, to take any steps toward the disposition of decedent's goods situated elsewhere and under the existing administration of another State, it would violate the common understanding respecting such matters and expose itself to the disregard of its judgments by the State which had appointed the executor and assumed the direction of his official conduct. Moreover,

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since the fourteenth amendment, the assumption of such a jurisdiction which conflicted with the exclusive authority of another State over a matter within its jurisdiction would itself be disregarded at the outset, at least in a Federal court; nor would the executor be left to the assertion of the invalidity of such proceedings, when it was presented for execution or as evidence. *Pennoyer* v. *Neff*, 95 U. S. 714, 24 L. Ed. 565; *Dewey* v. *Des Moines*, 173 U. S. 193, 19 Sup. Ct. 379, 43 L. Ed. 665; *Goldey* v. *Morning News*, 156 U. S. 518, 15 Sup. Ct. 559, 39 L. Ed. 517.

[5, 6] Section 1836a may be construed as intended for no more than to open the courts of the State to litigation in those cases where the law of the State appointing the executor authorized a foreign action; but in that case the validity of the process would be wholly dependent upon a condition of the law of Texas, which does not in fact exist. In so far, however, as without the authority of Texas, New York should attempt to adjust the obligations of the executor as such, and to make any final determination of his obligations in the distribution of assets already in process of administration in Texas, its act would necessarily be brutum fulmen in its result, and unconstitutional in its inception. Nor, indeed, is it in this instance possible to construe the section as intended to affect only goods now or hereafter within the jurisdiction of New York, as suggested above, because the language of the act is not apt to express such a distinction, and, in the absence of [617] some authoritative interpretation by the Court of Appeals of New York to that effect, no such construction should be placed upon it. Since, however, an interpretation may be placed upon the statute which is consonant with its constitutionality, that interpretation should be chosen, and the statute read only as opening the courts of New York to suits against executors in those cases where the law of the domiciliary State allows it.

[7] I have found only one decision upon such a statute, and that is the case of *Craig* v. *Toledo, Ann Arbor & North Michigan R. R. Co.*, 2 Ohio N. P., 64, which is to the contrary. However, this decision does not pass upon the va-

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lidity of the act in respect of its extraterritorial effect, but only goes so far as to hold that the State might determine in what cases a foreign executor might be sued, leaving for further determination the extent to which the judgment would be effective. That may well be true in Ohio; yet, as I have said, I hardly think that it can be supposed in the case of the New York Code, which contains full provisions for ancillary administration, that the suit authorized against foreign executors under section 1836a was only intended as an incident to ancillary administration. In any case, I do not feel disposed to follow that case, if it is to be interpreted more broadly.

Two objections may be raised to this disposition of the motion: First, it may be suggested that a Federal court does assume jurisdiction over the determination of suits against executors, though it will leave to the State courts of probate the actual enforcements of the decrees which result. In answer it must be remembered that a Federal court is not the court of an independent State, and that in any event it does not attempt to obtain jurisdiction outside of the State in which the executor is appointed. The Constitution, in giving to Federal courts jurisdiction over controversies between diverse citizens by sovereign power, gives an authority pro tanto over domestic administration which does not exist between independent States. It might, indeed, have gone further and made effective its own decrees, assuming the total administration of decedents' estates, except for the fact that this might involve purely domestic matters, and perhaps because it had no machinery.

The second supposed difficulty is practical, and arises from the fact that an absentee executor might remain inaccessible to the control of the State which appointed him. This question, however, goes only to the power of the State, which has assumed administration of the decedent's assets, to secure an efficient administration, and can not be the excuse for the assumption by another State of those functions. I do not forget those cases where the executor, having assets in his possession, has repudiated the authority of his own State and taken them out of its power. *Bergmann* v.

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Lord, 194 N. Y. 70, 77, 86 N. E. 828; *Lewis* v. *Parrish*, 115 Fed. 285, 53 C. C. A. 77. Those cases are to be interpreted upon the theory that the executor, having abandoned his obligations and being disposed to assume mere personal dominion over the assets, is lost to the State which originally assumed jurisdiction, and ceases to be effectively subject to any law. He becomes, as [618] it were, an outlaw, who may be brought to account and compelled to do justice personally wherever he may be found.

I have assumed throughout that section 1836a of the Code of Civil Procedure may give jurisdiction to a Federal court. This question need not be decided, because, even assuming it to be determined in the plaintiff's favor, it will not serve to protect the process here in question.

Motion to quash is granted.

UNITED STATES v. MOTION PICTURE PATENTS CO. ET AL.[a]

(District Court, E. D. Pennsylvania. October 1, 1915.)

[225 Fed. Rep., 800.]

COPYRIGHTS 65—COPYRIGHT LAWS—SCOPE.—Copyrights of dramatizations cover photoplay presentations of the same subject.[b]

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. § 62; Dec. Dig. 65.]

COMMERCE 15—MONOPOLIES 12—INTERSTATE COMMERCE—SUBJECTS OF.—Photoplay films, shipped from one State to another, are subjects of interstate commerce, and fall within the scope of Anti-Trust Act July 2, 1890, c. 647, 26 Stat. 209, prohibiting unreasonable and undue restraint of trade and commerce.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 17, 34, 35; Dec. Dig. 15; Monopolies, Dec. Dig. 12.]

MONOPOLIES 1—PATENT LAWS—ANTI-TRUST ACT.—The patent laws, which preserve to a patentee the exclusive right for a limited time of making and vending the patented article, are not repealed by

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[a] For opinion concerning record on appeal (230 Fed. 541), see *post*, page 222. The case is now pending on appeal in the Supreme Court.

[b] Syllabus copyrighted, 1916, by West Publishing Company.

Statement of the Case.

Anti-Trust Act July 2, 1890, and the patentee by virtue of his patent may impose reasonable conditions of bailment or sale.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 1; Dec. Dig. 1.]

MONOPOLIES 29—ANTI-TRUST ACT—"CONSPIRACY."—Under Anti-Trust Act July 2, 1890, which denounced unreasonable competition and conspiracies, a "conspiracy" may have as an element the seeking of an unlawful end or the employment of unlawful means, and the good motives of the conspirators are no defense.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 19; Dec. Dig. 29.

For other definitions, see Words and Phrases, First and Second Series, Conspiracy.]

MONOPOLIES 12—RIGHTS OF PATENTEES.—The owner of a patented device may acquire any other patents for improvements, or several owners may pool their ownerships for their joint protection; but such patents can not be acquired or combined for the purpose of unlawful restraint of trade.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 10; Dec. Dig. 12.]

[801] MONOPOLIES 12—WHAT CONSTITUTE—DEFENSES.—Motion picture producers and importers, some of whom had patents upon articles, such as the positive films, cameras, and projecting machines, formed a combination to regulate the trade. They created a board to censor films, and established exchanges, refusing to sell films to operators of theaters who did not belong to their exchanges, and who did not pay royalties on their machines to the combination, regardless of when or from whom they were purchased. The restrictions were attempted to be justified as a protection of the patent rights of the parties to the combination. *Held*, that such combination was invalid, as a violation of Anti-Trust Act July 2, 1890.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 10; Dec. Dig. 12.]

In Equity. Petition by the United States against the Motion Picture Patents Company and others to restrain defendants as a monopoly. Decree for petitioner.

T. W. Gregory, Atty. Gen., *G. Carroll Todd*, Asst. Atty. Gen., *Edwin P. Grosvenor*, Sp. Asst. Atty. Gen., and *Francis Fisher Kane*, U. S. Atty., of Philadelphia, Pa., for the United States.

J. H. Caldwell, of New York City, and *Charles K. Zug* and *John G. Johnson*, both of Philadelphia, Pa., for defen-

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dants General Film Co., Thomas A. Edison, Inc., Frank L. Dyer, William Pelzer, Melies Mfg. Co., Pathe Frères, Kalem Co., Gaston Melies, J. A. Berst, and Samuel Long.

James J. Allen, of New York City, for defendants Vitagraph Co. and A. E. Smith.

David J. Myers, of Philadelphia, Pa., and *George R. Willis*, *Luther M. R. Willis*, and *Frederick R. Williams*, all of Baltimore, Md., for defendants Armat Moving Picture Co., Harry N. Marvin, Jeremiah J. Kennedy, Biograph Co., and Motion Picture Patents Co.

R. O. Moon, of Philadelphia, Pa., for defendant Siegmund Lubin.

Charles Biddle, of Philadelphia, Pa., and *Henry Melville*, of New York City, for defendants Essanay Film Mfg. Co., George Kleine, Selig Polyscope Co., George K. Spoor, and W. N. Selig.

Charles F. Kingsley, of New York City (*Melville Church*, of Washington, D. C., of counsel), for all defendants.

DICKINSON, District Judge.

A petition was filed in this case under the act of July 2, 1890, averring the combination of the defendants to accomplish an unlawful restraint of trade, and consequent obstruction of the free flow of commerce in interstate transactions, in the sale of positive motion picture films and other necessary accessories of the motion picture art. The prayer is that a stop be put, by the power of the law, to the practices charged to be illegal.

The record is of such bulk, and the discussion has taken such a wide range, and has with such thoroughness dealt with all possible phases of the case, that to even outline, with anything like adequacy, all the considerations involved in its decision, would extend an opinion beyond manageable limits. The present discussion is therefore limited to two questions (and largely to one of these) which give us the bearing

points upon which the whole case turns. This restriction [802] does not imply the slighting of any feature of the arguments, so well worthy of the fullest attention, which has been addressed to us, because there is substantial accord in the thought that, with these questions eliminated, the defense has failed. This feature will, however, be adverted to later.

At the risk of being open to the criticism of its being wholly academic, a start may be made with a few general observations. The beginnings of this controversy are found in the ages-long struggle "to secure the blessings of liberty," to obtain which is stated to be one of the objects of our Constitution: There is deep-grained in human nature the impulse to influence, and, so far as it can be done, control, the actions of others. It is too much to expect that this control, when secured, will always be exerted for altruistic ends. Out of this condition has arisen the need of a power of government to check the restraints which the strong would otherwise impose upon those whom they could control. Power and efficiency, however, are possessed in insensible gradation, and there is a right to the liberty of its full, fair exercise. There would be no real gain in securing to some freedom from extra-legal control, by imposing upon all unfair and unreasonable restraint, through an unfair and unwise administration of the law.

The liberty spoken of in our Constitution had more direct reference to this latter freedom from the "undue and unreasonable" exactions of constituted rulers. In the cycle of human effort, we have come back to the needs which moved men into constituting rulers over themselves, and the power of the law has been invoked for protection against what are declared to be evil practices. The particular phase of liberty with which this law concerns itself is the freedom or free flow of commerce. It is based upon the right of every individual to choose his own calling in life, and to follow the trade of his choice unhampered by any undue and unfair interference from others. It secures this "blessing of liberty" to all by making it unlawful for any to conspire to bring about "restraint of trade or commerce." This is

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the genesis and motive of the act of July 2, 1890. It seeks (within constitutional limitations) to reach this end by declaring all such conspiracies to be criminal, and places under the ban of its condemnation all such attempts "to monopolize any part of trade or commerce." Its meaning has been declared in as broad and clean a sweep of language as could well be employed, and has been interpreted for us in a series of opinions which render further comment worse than vain. There are now more than a round dozen of these decisions in which can be found the rule to be applied to the facts of the instant case.

[1,2] The full text of the complaint appears in the record and is too lengthy for quotation. The gravamen of the offense may be gathered from the general summary that it is a conspiracy to drive from the field all other traders in the things which make possible the practice of the motion-picture art, and to monopolize to themselves that trade, and through this, the practice of the art itself. This latter feature justifies the interpolation into the discussion of a preliminary question which lies at the threshold of the proceedings. The defense asserts the real charge to be that of an effort to control the motion-picture business. This is asserted to be the business of dramatic rep[803]resentation, and dramatic representation to be the practice of an art. The control, with the seeking of which the defendants are charged, is therefore the control of an art, and not of trade, or of anything which is the subject of commerce, or can be brought within the laws relating thereto.

It has been settled by the decisions, under the earlier copyright laws, that the copyright of a dramatization covered a photo-play presentation of the same subject. This was based upon the recognition of what every observer experiences, the similitude, if not identity, of the impressions received from seeing a photo-play and from the same play acted out by actors living and moving before his eyes. The photo-play business may therefore be well said to bear the same relation to dramatic art which the theatrical business does. The latter has not, however, the same relation to trade and commerce. The moving-picture business, as an entirety, is made

up of the presentations, to which the public is invited, and of a trade in other things, which make this final display possible. If it is a photo-play, it has, of course, the same basis of the labors of the author and the art of the actor as has the acted play. The spectator of the play sees the actors acting out the play. That which the spectator of the photo-play thinks he sees is an illusion. He thinks he sees, for instance, a man moving (or a picture of it), and in one sense he does, because such is his mental impression of what is before him. This illusion is produced by projecting upon a screen, in rapid succession, enlarged reproductions of a series of consecutively quickly taken photographs of a man as he is moving. There must be, therefore, in the motion-picture business the use of all these additional accessories, from the screen back to the raw film and the camera, as part of the apparatus for the production of a photo-play.

One of these essential things in the motion-picture business is the positive motion-picture film or reel, and the charge made against these defendants is that, whatever may have been their final purpose with respect to the control of the art, what they combined to do, and have done, is to restrain trade or commerce in these films, which are articles of trade and the subject of large interstate transactions, in which the defendants had part. The latter fact is admitted. It is evident that whoever controls the films referred to controls the motion-picture business, but the point with which we are now concerned is that interstate trade in these films is within the statute.

[3-6] The next branch of the defense which presents itself for analysis and discussion is that based upon the patent rights of the Motion Picture Patents Company. The plea is, in legal effect and in practical acknowledgment, one in confession and avoidance, for there is, as already stated, a substantial (although not formal) admission that, with this patent-right ownership out of the case, plaintiff should have the relief prayed.

The importance of the question thus raised can not well be over-estimated. The eulogy which counsel have bestowed upon our patent law system springs from real feeling, and is

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not only a beautiful, but doubtless a deserved, tribute to its merits, and their eloquent portrayal of the benefits which have flowed from it is as true as it is impressive. [804] It is easy to keep in sympathetic touch with them in the first step in their argument, and to accept the proposition that the Anti-Trust Act did not work a repeal of the patent laws. This must be accepted on general principles, even were its supports not buttressed by the cases to which we have been referred. That their validity is not open to question in a collateral proceeding, and is to be assumed in this inquiry, must also be conceded. Prima facie they are and must be taken to be valid, and to be for what the claims allowed by the Patent Office show.

A little space may now be devoted to the consideration of what a patent right is, in order that we may understand the true value of this part of the defense. As has been well said, the patent laws do not confer any right to make, use, or vend the subject matter of an invention. This is the natural right of the inventor. What the patent law does do, for one thing, is to take away, for a limited time, from all others than the patentee, or his assigns, that which would otherwise have belonged to them also—the right to make, use, or vend the patented article. Another thing it does is to proffer to the patentee the aid of the law in enforcing this prohibition upon others. The latter is really the right given. It is the right to a remedy. It is, as it is sometimes phrased, a proprietary right. There is also the idea of property of a special kind, which has all the general characteristics of other kinds of property. The ownership of a patent, as the ownership of any form of property, may confer a power upon the proprietor which he otherwise might not have been able to wield. It has its peculiarities, as other kinds of property have, and certain consequences flow from this. To one of these we will later refer, but the point now presented is that a patent as property must have the same relations to the act of 1890 as would any other kind of property. In view of this, it is a little difficult to grasp the thought that, in this broad aspect, patents are not subjected to the provisions of this act, just as is any other species of property. We see no

escape from the conclusion that they are. Just here, however, comes in a difference born of one of the peculiarities to which reference was made.

The act of 1890, in its first section (Comp. St., 1913, § 8820), declares combinations in restraint of trade to be illegal. By its second section it condemns monopoly. The opinions in *Standard Oil Co.* v. *United States*, 221 U. S., 1, 31 Sup. Ct., 502, 55 L. Ed., 619, 34 L. R. A. (N. S.), 834, Ann. Cas. 1912D, 734, *Keystone Watch Co.* v. *United States* (D. C.), 218 Fed., 502, and in *Patterson* v. *United States*, 222 Fed., 599, 138 C. C. A., 123, make clear the purpose and scope of the two sections. The condemnation is visited both upon the means and the end, forbidden by law. A peculiarity of the rights of the owner of a patent, as distinguished from other property, is this: Each has the right to sell that which is his, but the owner of the patent has the exclusive right to sell his patented article. This is, in a very substantial sense, a monopoly. It must be, however, that the monopoly here meant is not the monopoly condemned by the act of 1890. To hold otherwise would clearly be, as counsel for defendants urge, a logical absurdity, because there can be no such thing as restraint in a trade which has no existence, and a monopoly created by law, in pursuance [805] of a policy of the law, can not be said to result from such restraint. To transfer a phrase from the opinion of Judge Cochran, in *Patterson* v. *United States*, which was directed to something else, but which is applicable here:

> "There can be no monopolizing in the legal and accurate sense of the word where there can be no common occupation."

The right to sell carries with it the right to withhold from sale, or to part with the possession without parting with the ownership. It also confers the right to impose reasonable and legal conditions of bailment or sale "restricting the terms upon which the [patented] article may be used and the price to be demanded therefor." All these propositions are clear, and have been expressly held to be the law. *Bement* v. *National Co.*, 186 U. S., 70 and 72, 22 Sup. Ct., 747, 46 L. Ed., 1058; and *Standard Co.* v. *United States*, 226 U. S., 20, 40, 33 Sup. Ct., 9, 57 L. Ed., 107. The limitation that the

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terms must be legal should, however, not be lost sight of. An effort, for instance, after a sale, to impose a sale price condition, which will follow the article through successive sales, will not be upheld.

We have, therefore, to determine the limits of a right and a wrong which seem to overlap each other. It is the right of a patentee, through having the exclusive sale of the patented article, to control, and in that sense to monopolize, the trade in it. It is wrong by any illegal restraint of trade to monopolize it, or any part of it. On the one hand, it can not have been intended to make it unlawful to acquire that the right to which the law has conferred. On the other hand (as already observed), it can not be that the grant of a patent right confers a license to do that which the law condemns.

The solution of the problem is to be sought by finding the special field of operation of each of these laws. There is a field of trade, the sole occupancy of which may be in a patentee. Here he is supreme, and the keeper of the gate of entrance. There is another field which is in the common occupancy of all. Where the law has given the whole field to a patentee, with the express right of exclusion of others, and the use of the power of the law to enforce the exclusion, it is unthinkable that such exclusion is an illegal restraint of trade. Where the field, however, is open to all, competition for trade is likened to a race in which all may enter, but in which there must be no unfair jostling or hampering of others. Each one is free to exert all his powers, and distance, if he can, all competitors, and win all the prizes; but he must run fairly and accord to others a like freedom. If he possesses a patented device which will aid him in the race, he may use it, as he may use any other form of property; but he must put it only to its proper use, and if he uses it as a weapon to disable a rival contestant or to drive him from the field, he can not justify such use because of his patent right, except to the extent of protecting his exclusive right. We have, therefore, the principle, which is recognized in all the cases, that if the subject matter of a contract, which otherwise would be illegal because in restraint of trade, is a patented article, this takes away the illegality only to the

extent to which the field of the trade, controlled through the combination, is coextensive with [806] the field within which exclusive control has been granted by the law. This is the doctrine of *Henry* v. *Dick*, 224 U. S. 1, 32 Sup. Ct. 364, 56 L. Ed. 645, Ann. Cas. 1913D, 880, *Bement* v. *Harrow Co.*, 186 U. S. 70, 22 Sup. Ct. 747, 46 L. Ed. 1058, the *Bath Tub case*, 226 U. S. 20, 33 Sup. Ct. 9, 57 L. Ed. 107, and all the other kindred cases to which we have been referred.

The difference between this private field and the common field of trade is, as a distinction, sufficiently clear; but there may be again an overlapping. The owner of a patented article has the right to enter upon this common field of trade. His patented article may be so superior, or of such less cost than anything else upon the market, as to supplant all others and give to him the whole trade as effectually as if his patented article had originally had the field to itself. Indeed, its ownership may be sought, for the reason that it has this possibility of power. Again, the patent may apply to only certain features of the article of trade, and yet enable the owner to reap the same advantage, and control a trade in what is beyond the exclusive rights given by the patent. The special circumstances affecting a particular contract or combination may make the principle difficult of application and the line of legality or illegality hard to draw, but the principle remains the same. The legality of such a contract is determined by the judgment of whether, in its whole scope and legal intendment, it is fairly limited in its operation to the proper field of trade belonging to the patentee, and whether any further advantages which flow to him are fairly incidental, and are not the evil fruit of unfair practices employed to restrain the right of others to a share of the common trade. It is the legal intendment of the contract or combination which is to be found. The motives of the contracting parties, whether innocent or otherwise, do not determine the real character of their act; but it is determined through the judgment of the law. Motives and intentions, except as declared or appearing from the character of the act, are too vague and difficult of ascertainment to be made the basis of the legal judgment called for in such cases. A conspiracy under this statute, as at

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common law, may have as an element the seeking of an unlawful end or the employment of unlawful means.

We learn from the opinion in the Keystone Watch Case Co. case that the prohibited restraint of trade, beside being undue and unreasonable, must be the direct, and not a merely incidental, result of the contract or combination, before the latter will be condemned as illegal. If it is asked to be condemned, not because of the illegality of the means employed to accomplish its end, but because monopoly results as a consequence, the monopoly must be shown to be an unlawful monopoly, not the monopoly granted by the patent laws. A contract or agreement among business men which had as its end to preserve to the owners of a patent the exclusive sale of the patented article, and as its means the exercise of due, reasonable, and fairly proper control over sales to be made, would not be condemned as void in itself or justify any inference of guilt under the act of 1890. Where, however, by what was agreed to be done, the end indicated, in the sense of the result to be expected, was a monopolistic control of what was not the exclusive property of any one, or such a monopoly was [807] the direct result of undue and unreasonable restraints of trade, to be employed as the means of carrying out what was to be done, the fact that any one or more of the persons concerned owned patents would not prevent a finding of conspiracy.

A feature of the Watch Case Co. litigation affords us an illustration of the extent to which patent rights enter into the defense to proceedings of this character. The feature alluded to was, in the language of the opinion, that of—

"the system under which the Howard watch was sold by defendants. Certain * * * parts of the Howard watch were covered by bona fide patents taken out and used for a lawful purpose, and as the owner of these patents the company had the right to make a direct agreement with the jobbers, whereby a minimum price was fixed at which the jobber might sell. * * * The company went further, however, and by mere notice to the retailer, accompanying the box in which the watch was sold by the jobber, attempted to fix the minimum price at which the retailer might sell to the consumer. * * * When the company sold the watch to the jobber, it had fully exercised its right to vend, and had no right to use the notice subsequently given in order to control the price at which the retailer might sell."

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As a conclusion to the whole discussion, we deem the Bath Tub case to be decisive of the principle contended for by the United States. There, it is true, the patent was not on the ware, which was the subject of the trade sought to be monopolized, but on a tool used in its manufacture, and the case doubtless might have been ruled upon that distinction. We cannot accept, as well taken, the position that it was so ruled, because the court, in formulating a statement of the principle upon which the ruling was based, expressly refused to plant the decision on this narrow ground, but placed it upon the broad principle that the agreements in that case—

"transcended what was necessary to protect the use of the patent or the monopoly which the law conferred upon it. They passed to the purpose and accomplished a restraint of trade condemned by the Sherman law. * * * The agreements * * * combined the manufacturers and jobbers, * * * which combination was condemned by this court as offending the Sherman law. The added element of the patent * * * cannot confer immunity from a like condemnation; * * * and this we say without entering into the consideration of the distinction of rights for which the Government contends between a patented article and a patented tool used in the manufacture of an unpatented article. Rights conferred by patents are indeed very definite and extensive, but they do not give, any more than other rights, an universal license against positive prohibitions. The Sherman law is a limitation of rights, * * * which may be pushed to evil consequences. * * *"

We would feel constrained, on the authority of this case alone, to find that the agreements and acts of the defendants in the present case went far beyond what was necessary to protect the use of the patents or the monopoly which went with them, and that the end and result, which would be expected to be and was accomplished, was the restraint of trade condemned by law. Some of the considerations which move to this conclusion are stated later.

This is a lengthy prelude to the consideration of the special facts of this case. We feel relieved from the necessity of any extended reference to them, because they are set forth in the complaining petition with a precision and accuracy which has prevented denial, except [808] as to the motives which actuated the defendants and the legality of the monopoly. With respect to the motives and conscious

purposes by which men are actuated, it has been well said that these "cannot be easily estimated," and we may concede to the defendants no purpose to offend against or to evade the law, and that their intentions were as beneficent and have resulted in as much good to the patronage of the art as is claimed, and that this good bears a fair relation to the profits received by them. This is foreign to the inquiry which we have made, because the duty to refrain from what is prohibited by law "cannot be evaded by good motives." Moreover, "the law is its own measure of right and wrong," as well as the judge of whether a transaction is of the character which it condemns. If, in the judgment of the law, a contract or coöperating agreement is such as to work an undue and unreasonable restraint of trade, and through such restraint to monopolize trade or any part of it, the judgment is one of condemnation, no matter how innocent or otherwise praiseworthy the motives of those who had part in it.

We do not, therefore, feel called upon to make any specific findings on this subject beyond what is stated to be found. The real motives of those whose minds conceived and whose wills carried through this combination were doubtless like those behind almost all other human acts, probably of a mixed character. We would not be justified, and would certainly have no wish, to deny the presence of the very laudable motives which defendants avow in their answer, some of which were to gratify their desire to allay bickerings and recriminations among themselves, to advance and improve the art, to protect the morals of the public, and, as they frankly admit, to make money for themselves. Certain it is that the end and purpose of the plan was to dominate and control the trade in all the accessories of the art, and, in order to assure this, to control the entire motion picture business. We are driven to this conclusion, not only because that is the plain meaning of what they did, but also because they themselves categorically declare the latter to be the imperative need of the business, and one which they alone could supply. The need was for a single directing and regulating head. This extended even to a censorship of what was shown. The United States could not, and the States would not, interpose

for the purpose of regulation, and the defendants claim the credit of having performed this neglected duty of the State. In doing all which was done, the defendants not merely deny the illegality of either end or means, but also lay claim to commendation. We only mention this to make clear the fact that they did monopolize, and the only question left is whether this monopoly is a lawful monopoly, or was accomplished through an unlawful restraint of trade.

The combination was not formed until 1908. The defendants were at that time engaged in the business as manufacturers or importers. There were scores of jobbers buying and distributing films and necessary supplies to thousands of exhibitors. The business was expanding, literally by leaps and bounds. The total investment ran into millions. There was therefore a trade to be restrained, and one well worth monopolizing. The original plan, if it was contemplated, did [809] not disclose any purpose to exclude the middlemen, and, from its first being put in operation, 116 jobbers were licensed by and did business with the defendants. Within a short time, however, the absorption of this part of the trade was decided upon, and the General Film Company was formed to take over the business of distribution. How effective and thorough were the methods employed is shown by the fact that, of the 116, there is left one solitary survivor.

The plan out of which these methods grew was first to combine the defendants, who were manufacturers and importers of films, in an agreement to act as one man might have acted. Lists of exchanges and of theaters were prepared, and no exchange was permitted to have films, and no theater to exhibit them, unless with the consent of all of the defendants. The names of none appeared upon this list except such as bought all supplies from the defendants, and any who dealt otherwise were dropped. Every theater was required to pay a royalty for the use of a projecting machine, even when the machine had been owned by the exhibitor before the combination was formed. The films passed into the possession of exchanges and exhibitors under an agreement which enabled the defendants to recall them at will. It is too clear for comment that the mere possession of the

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power here shown would make its assertion seldom necessary. It was, however, effectively exercised.

It is also clear that such a combination is condemned by the act of 1890, unless immunity is given by the patent laws. The pressure here is upon the weak point of the argument on behalf of the defendants. The fault in it is basic. There is doubtless injustice in applying, even rhetorically, the "dead Indian" aphorism to trusts. It may be admitted that there may be trusts which are both living and good. When a monopoly has been found, however, to be the result of an unlawful restraint of trade, the argument that the combination through which it has been accomplished is a good trust, or was formed from good motives, or that good results from the monopoly, is for legislative, and not judicial, consideration. As already stated, it is the legal intendment of the whole scheme which determines its character, what is its end, and what the means to be employed, to be found from the natural and to be expected results. Here, again, the illuminating phrase employed in the Keystone Watch Co. opinion clarifies the thought. If the end is monopoly and the means the restraint of trade, the inquiry is directed to the character of the restraint. If that is undue and unreasonable, and was directly intended, and the monopolistic result flows as a direct and not a merely incidental consequence, the combination through which it is brought about is illegal. The same conclusion follows a finding that the end is illegal, because reached through the same means. Indeed, the two things come to be nearly, if not quite, the same, although there is room for a difference.

The defendants had the right to propose to themselves, as an end, the protection of their exclusive right to sell an article, protected by a patent, which was their property. They had the right to employ, as a means to this end, due and reasonable regulations, and to impose any lawful conditions of sale. If restraint of trade and monopoly flowing from it incidentally resulted as a consequence, as neither the [810] end proposed nor the means employed was unlawful, the combination which effected these objects could not justly be condemned.

The owner of a patented device, process, or product may undoubtedly acquire from another any issued patents for improvements, and we see no reason to deny the right of the owners of the original patent, and of the patented improvements, to pool their ownerships for their joint or common protection. This we understand to have been expressly ruled. *United States* v. *United Shoe Co.* (D. C.) 222 Fed. 349. Indeed, this case may well be claimed as authority for the proposition (within its facts) that there might be a combination of the owners of different patented machines all entering into a manufacturing trade. However this may be, the distinction sought to be pointed out is that while the owner of a patent on a plow, covering the handles or beam, might acquire or join with the owners of patents covering the moldboard, or share, or other parts of the plow, for the protection of the patented rights of all, and thereby incidentally secure an enlarged part of the trade in plows, the judgment would refuse to sanction a combination between the owners of patented plows, patented harrows, patented reapers and binders, and other implements of husbandry, and large dealers in these implements, who were not owners of patents, for the purpose of monopolizing the whole trade in the products of agriculture, if the direct end first proposed was to unduly and unreasonably restrain trade, as a means to the final purpose of monopolizing. The ownership of the patents, in such a case, surely could not be accepted as a defense to the charge of unlawful combination.

If a reason to support the distinction between these supposititious cases is asked for, it may be found in the fact that, in the first case, it could not be concluded that the scheme of the combination had no normal and real relation to the protection of the patent rights; in the second case, no such relation could be even plausibly said to exist, and its assertion would be characterized as a pretense.

The legal justification, set up by the defendants, for what they have done, and for everything they have done, is that in so doing they were lawfully asserting rights acquired by them through a large number of overlapping patents. The total number reaches sixteen. Ten of these are ad-

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mittedly, however, of minor importance, and, indeed, of no importance, in their bearing upon the case. The remaining six may be roughly catalogued as one each pertaining to films, cameras, and what is termed the "Latham loop," and three to projecting machines. The ownership of these patents was divided among some of the defendants. Others had no interest therein, except in so far as they dealt in the different apparatus, features of which were covered, or claimed to be covered, by the several patents, respectively. If the combination had been limited, and the agreements and the scheme in its entirety had possessed, or could be found to have, any normal real relation to the assertion and protection of these patented rights, and this had been the end proposed, the defendants would be upheld in the maintenance of such rights.

We are constrained, however, to find that there was no such relation, but that the end, directly proposed, was the imposition upon the [811] trade of an undue and unreasonable restraint, in order that, as the immediate and direct effect and result of the combination, the defendants might monopolize the trade in all the accessories of the motion-picture art so far as they are articles of commerce. A further end proposed, and which has largely been achieved, is the domination of the motion-picture business itself, and it requires no prophetic vision to foresee that the ultimate result would be that no play would be written, or dramatically enacted, except by authors and artists favored by the defendants.

It is further found as a fact that the defendants did, in furtherance of the scheme of the combination so to do, directly impose upon the trade undue and unreasonable restraint, and that such restraint was the end proposed to be directly reached and was not merely incidental to efforts to protect the rights granted by the patents, but went far beyond the fair and normal possible scope of any efforts to protect such rights, and that as a direct and intended result of such undue and unreasonable restrictions the defendants have monopolized a large part of the interstate trade and commerce in films, cameras, projecting machines, and other

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articles of commerce accessory to the motion-picture business.

It is further found, for what the finding may be worth, that although the ends proposed in the combination and carried out by the defendants were first this restraint, and through this the monopolizing of the trade, to reap commercial advantages to themselves, a further inducement and motive was (and these were also ends in view) the wish to relieve each other from the odium of infringement, to end contests which hampered the development of the art, to protect the morals of the public by the prevention of the exhibition of suggestive or otherwise improper pictures, to promote the progress of this branch of dramatic art by improving the character of the shows, both in the artistic merits and mechanical perfection of the display, and generally to supply what, up to that time, the State had neglected to furnish, a regulating and governing authority over the entire motion-picture business. The end and purpose of the combination, and in this sense the motive or moving cause, further was not to protect the patent rights, which the Motion Picture Patents Company was organized to take over; but the control of the patents was made a feature of the scheme, in the belief, or at least the hope, that this would render the scheme (otherwise illegal) not open to the condemnation of the law.

We conclude with the formal finding, in the language of the act of Congress, that the contracts enumerated in the petition, and the combination there described, were a conspiracy in restraint of trade or commerce among the several States and with foreign nations, and were and are illegal, and that the defendants and each of them (with the exception next noted) have attempted to monopolize, and have monopolized, and have combined and conspired, among themselves and with each other, to monopolize, a part of the trade or commerce among the several States and with foreign nations, consisting of the trade in films, cameras, projecting machines, and other accessories of the motion-picture business, as charged in the petition of complaint filed.

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[812] The exception referred to is this: Melies Manufacturing Company, one of the corporation defendants named in the petition, has denied (as have all of the defendants) that it was in any sense a party to the combination charged. We have gone over all the proofs without finding any, which go to making good of the charge against this particular defendant. It is therefore excluded from the findings made, and the petition as against it is dimissed.

The conclusion is that the petitioner is entitled to the relief prayed, so far as indicated by this opinion, and a decree to effectuate the findings made may be submitted. This statement should perhaps be added: The point has been raised by the United States that the Edison patent on the picture film was limited to its negative form, and did not cover the positive motion-picture films, which were dealt in commercially. The conclusions to which we have arrived have been reached without such a finding.

UNITED STATES *v.* MOTION PICTURE PATENTS CO. ET AL.[a]

(District Court, E. D. Pennsylvania. March 9, 1916.)

[230 Fed. Rep., 541.]

APPEAL AND ERROR 597(1)—RECORD—FORM.—Act Cong. Feb. 13, 1911, c. 47, 36 Stat. 901 (Comp. St. 1913, §§ 1656, 1657), provides that the appellant or plaintiff in error shall cause to be printed under such rules as the lower court shall prescribe, and file in the office of the clerk of the Circuit Court of Appeals, 25 printed transcripts of the record of the lower court, and of such part or abstract of the proofs as the rules of the Circuit Court of Appeals may require, and in such form as the Supreme Court shall prescribe, one of which transcripts shall be certified. Supreme Court rule 31 (32 Sup. Ct. xiii) prescribes the form of printed records and briefs. Equity rule 75 (198 Fed. xl, 115 C. C. A. xl) provides that the evidence to be included in the record on appeal shall not be set forth in full, but shall be stated in simple and condensed form, the testimony being

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[a] For prior opinion (225 Fed., 800), see *ante*, page 204. The case is now pending on appeal in the Supreme Court.

stated only in narrative form, save that, if the parties desire it and the court or judge so directs, any part of the testimony shall be reproduced in the exact words of the witness, that the appellant shall present his statement of the evidence, and that, if it be true, complete, and properly presented, it shall be approved by the court or judge. Because of the anticipated bulkiness of the record in a suit in equity, the parties had the notes of the testimony transcribed directly into printed pages and bound into convenient volumes. The record as so printed conformed to rule 31 and to the provisions of the statute. *Held* that, while the record in this shape was found satisfactorily convenient, the district court could not approve a transcript of the record for transmission to the Supreme Court without the statement in narrative form required by rule 75, unless leave to omit such statement was obtained from the Supreme Court, as it would be an eva[542]sion of the duty imposed on the district court to apply the exception contained in the rule as to setting forth parts of the testimony in full to the whole testimony.[a]

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2627-2631, 2635-2638; Dec. Dig. 597(1).]

In equity. Suit by the United States against the Motion Picture Patents Company and others. On petition for order respecting the record on appeal. Petition granted conditionally.

See, also, 225 Fed., 800.

Edwin P. Grosvenor, Sp. Asst. Atty. Gen., of New York City, for the United States.

Charles F. Kingsley, of New York City, *Melville Church*, of Washington, D. C., and *R. O. Moon*, of Philadelphia, Pa., for defendants.

DICKINSON, District Judge.

The act of February 13, 1911, was passed to reduce the expense of appellate litigation and in relief of some of the labor involved in it. The present petition invokes the right of defendants to the benefits of the law. To this they are entitled. *Rainey* v. *W. R. Grace & Co.*, 231 U. S., 703, 34 Sup. Ct., 242, 58 L. Ed., 445.

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The taking of testimony was in progress when the present equity rules went into effect. The bulkiness of this part of the record was foreseen. The parties therefore resorted to the very sensible expedient of having the notes of testimony transcribed directly into printed pages and these bound into convenient volumes. This was so done as that the record thus printed conforms to the requirements of rule 31 of the Supreme Court (32 Sup. Ct., xiii) and brings the appellant within the provisions of the statute. Thus far no doubt of the proper course to be pursued could arise. The record would be certified in conformity with the statute. If this were done, however, the testimony and evidence would be returned in extenso as offered and introduced. This brings equity rule 75 (198 Fed., xl. 115 C. C. A., xl) into operation. The requirement of the rule that evidence be put in condensed and the testimony into narrative form would not be met. In the absence of a compliance with the rule in this feature, the court could not certify its approval of a "statement" which was entirely absent. To apply the exception, under which any part of the testimony may be set forth in full, to the whole testimony, would be an evasion of the duty imposed by the rule. The appellant and this court can be relieved of the obligation of rule 75 only by the Supreme Court.

To facilitate any application which may be made to that court, we take the liberty of stating the result of our experience with the printed record of the testimony in its present shape to be that we found it satisfactorily convenient. We further state our willingness to approve the record returned in this form, provided the omission of a statement of the evidence in narrative form has the sanction of the appellate court. The prayer of the petition is therefore granted, to the extent that the record as printed and used in the hearing of the case in this court shall be used in the preparation and as part of the transcript of the record of this court in transmitting the record for [543] review; such printed record being found to comply with the requirements of the act of February 13, 1911. No transcript of the record for transmission to the Supreme Court will, however, be ap-

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proved without the statement in narrative form required by equity rule 75, unless leave to omit such statement be granted by the Supreme Court.

UNITED STATES v. DELAWARE, L. & W. R. Co. ET AL.[a]

(District Court, D. New Jersey. April 7, 1914.)

[213 Fed. Rep. 240.]

CARRIERS (§ 25)—REGULATION OF INTERSTATE RAILROADS—COMMODITIES CLAUSE OF INTERSTATE COMMERCE ACT—SEPARATE CORPORATION.—Under the decisions of the Supreme Court construing the Commodities Clause of Hepburn Act June 29, 1906, c. 3591, § 1, 34 Stat. 584 (U. S. Comp. St. Supp. 1911, p. 1287), and holding that it does not prohibit a railroad company from transporting in interstate commerce commodities manufactured, mined, produced, or owned at the time of shipment by a distinct bona fide corporation, merely because of the company's ownership of stock in such corporation, irrespective of the extent of such stock ownership, a railroad company, owning and holding as lessee, at the time of the passage of the act, a large quantity of coal lands and extensive mines and storage and sales equipment throughout the country, which after such decisions, in good faith, organized a separate coal company to lease its outside equipment and buy the product of its mines at the breakers, in which corporation it owns no stock, but sold the greater part to its own stockholders, by whom much of it was afterwards sold to third persons, is not prohibited from carrying the coal from its mines after it has passed into the ownership of the coal company.[b]

[Ed. Note.—For other cases see Carriers, Dec. Dig. § 25.]

CARRIERS (§ 25)—REGULATION OF INTERSTATE RAILROADS—COMMODITIES CLAUSE OF INTERSTATE COMMERCE ACT—CARRIAGE OF PROPERTY OWNED BY SEPARATE CORPORATION.—It is insufficient to render such transportation unlawful that a comparatively small number of persons own a controlling interest in both the railroad company and the coal company, and that some of the officers and directors of the two are the same, where the business of each is separately conducted, and no discrimination is shown to have been made by the railroad company in favor of the coal company as a shipper.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 25.]

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[a] For opinion of Supreme Court reversing the judgment of the District Court (238 U. S. 516), see post, page 260.

[b] Syllabus copyrighted, 1914, by West Publishing Company.

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CARRIERS (§ 25)—REGULATION OF INTERSTATE RAILROADS—COMMODITIES CLAUSE OF INTERSTATE COMMERCE ACT—INTEREST IN COMMODITY CARRIED.—A contract between the two companies, by which the coal company agreed to buy f. o. b. at the mines all of the coal mined or purchased by the railroad company which it desired to sell, and to pay for certain grades thereof a stated per cent of the general average f. o. b. prices of such coal at tidewater points, does not leave the railroad company with "any interest, direct or indirect," in the coal, after its delivery to the coal company, which renders its transportation unlawful under the statute, where all shipments are made pursuant to orders of the coal company, and the latter also has full control over the prices at which it sells.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 25.]

In Equity. Suit by the United States against the Delaware, Lackawanna & Western Railroad Company and the Delaware, Lackawanna & Western Coal company. On final hearing. Decree for defendants.

[241] *F. R. Coudert* and *H. T. Kingsbury*, both of New York City, for plaintiff.

W. S. Jenney, of New York City, and *J. G. Johnson*, of Oneonta, N. Y., for defendants.

Before GRAY, BUFFINGTON, and MCPHERSON, Circuit Judges.

J. B. MCPHERSON, Circuit Judge.

This proceeding is based chiefly upon the Commodities Clause (act June 29, 1906, c. 3591, § 1, 34 Stat. 584 [U. S. Comp. St. Supp. 1911, p. 1287]), which forbids any railroad company to carry in interstate commerce after May 1, 1908—

"* * * any article or commodity, other than timber and the manufactured products thereof, manufactured, mined, or produced by it or under its authority, or which it may own in whole or in part, or in which it may have any interest, direct or indirect, except such articles or commodities as may be necessary and intended for its use in the conduct of its business as a common carrier."

The Government's contention is that the Delaware, Lackawanna & Western Railroad Company is violating this statute because it is carrying in such commerce anthracite coal

originally produced by its own mines in Pennsylvania or bought from other mine-owners in that State, the Government alleging that during such carriage the railroad continuously retains some kind or degree of interest or ownership in the coal. The railroad denies that any such interest or ownership exists, averring that the coal is sold in good faith before the carriage begins; the other defendant, the Delaware, Lackawanna & Western Coal Company, being the buyer under a contract that will be referred to hereafter. The Government attacks this contract, declaring it to be merely a subterfuge, and to have no effect in divesting or modifying the railroad's title. The questions raised by the record are of very great importance, and it is therefore a matter of much satisfaction that the Supreme Court has already considered the general subject, and has laid down the rules by which the controversy must be decided. We think it desirable to preface the discussion by stating in sufficient outline (even at the risk of seeming diffuse) what has been said and done in two previous suits where the meaning and effect of the clause under consideration were directly involved.

In June, 1908, the defendant railroad and five other coal-carrying roads were brought into the Circuit Court for the Eastern District of Pennsylvania charged with violating the statute. The companies appeared and defended, and the cases were argued upon the several bills or petitions and the answers thereto, no testimony having been taken. In September of that year the Circuit Court dismissed the proceedings, one of the judges dissenting. The majority opinion (164 Fed. 215 et seq.) was put upon the ground—we state it briefly and in general terms—that under the proper construction of the statute a railroad was forbidden to carry its own coal to market, and was thus deprived of its property in violation of the fifth amendment to the Federal Constitution. The dissenting opinion rests upon the propositions that the power to regulate commerce includes the power to reg- [242] ulate the carrier, and that commerce might be lawfully regulated by ordaining that a public carrier should not also be a private shipper. The

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cases were then appealed to the Supreme Court, and were decided by that tribunal early in May, 1909. *United States* v. *Delaware & Hudson Co.*, 213 U. S. 367, 29 Sup. Ct. 527, 53 L. Ed. 836 et seq. The opinion shows that the court did not pass upon the differing views of the circuit judges, and did not find it necessary to discuss the fifth amendment. But the Government's contention concerning the scope and meaning of the clause was stated, and the far-reaching consequences of such contention were recognized. The present Chief Justice (who wrote the opinion of the court) declared (213 U. S. 406, 29 Sup. Ct. 535 [53 L. Ed. 836]) that:

"* * * If the contention of the Government as to the meaning of the Commodities Clause be well founded, at least a majority of the court are of the opinion that we may not avoid determining the following grave constitutional questions: (1) Whether the power of Congress to regulate commerce embraces the authority to control or prohibit the mining, manufacturing, production, or ownership of an article or commodity, not because of some inherent quality of the commodity, but simply because it may become the subject of interstate commerce. (2) If the right to regulate commerce does not thus extend, can it be impliedly made to embrace subjects which it does not control, by forbidding a railroad company engaged in interstate commerce from carrying lawful articles or commodities, because, at some time prior to the transportation, it had manufactured, mined, produced, or owned them, etc.? And involved in the determination of the foregoing questions we shall necessarily be called upon to decide: (a) Did the adoption of the Constitution and the grant of power to Congress to regulate commerce have the effect of depriving the States of the authority to endow a carrier with the attribute of producing as well as transporting particular commodities, a power which the States from the beginning have freely exercised, and by the exertion of which governmental power the resources of the several States have been developed, their enterprises fostered, and vast investments of capital have been made possible? (b) Although the Government of the United States, both within its spheres of national and local legislative powers, has in the past for public purposes, either expressly or impliedly, authorized the manufacture, mining, production, and carriage of commodities by one and the same railway corporation, was the exertion of such power beyond the scope of the authority of Congress, or, what is equivalent thereto, was its exercise but a mere license, subject at any time to be revoked and completely destroyed by means of a regulation of commerce?"

Upon these serious questions, however, the court intimated no opinion, because an analysis of the clause and the ascer-

tainment of its true meaning thereby rendered such an opinion unnecessary. Without following the analysis, it is enough to say that the court did not approve either of the constructions maintained in the opinions of the Circuit Court, but reached its own conclusions on this subject, stating the true meaning of the statute to be as follows (213 U. S. 415, 29 Sup. Ct. 538 [53 L. Ed. 836]):

"We then construe the statute as prohibiting a railroad company engaged in interstate commerce from transporting in such commerce articles or commodities under the following circumstances and conditions:

"(*a*) When the article or commodity has been manufactured, mined, or produced by a carrier or under its authority, and at the time of transportation the carrier has not in good faith before the act of transportation dissociated itself from such article or commodity; (*b*) when the carrier owns the article or commodity to be transported in whole or in part; (*c*) when the carrier at the time of transportation has an interest, direct or indirect, in a legal or [248] equitable sense, in the article or commodity, not including, therefore, articles or commodities manufactured, mined, produced, or owned, etc., by a bona fide corporation in which the railroad company is a stockholder."

In the Circuit Court no testimony had been taken, but the controversy had been heard upon the pleadings, and mainly for this reason the Supreme Court did not give particular directions concerning each defendant, but remanded with general instructions that such further proceedings be taken as should be necessary to apply and enforce the statute interpreted as just set forth.

After the cases had been sent back for further proceedings, the Government in March, 1910, asked leave to amend its charge against the Lehigh Valley Railroad Company, one of the six roads originally attacked. This amendment was afterwards summarized by the Supreme Court in 220 U. S. at page 268, 31 Sup. Ct. at page 389 (55 L. Ed. 458), as follows:

"In substance it was averred that as to this particular coal company the railroad company was not only the owner of all the stock issued by the coal company, but that the railroad company so used the power thus resulting from its stock ownership as to deprive the coal company of all real independent existence, and to make it virtually but an agency or dependency or department of the railroad company. In other words, in great detail facts were averred which tended to

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establish that there was no distinction in practice between the coal company and the railroad company, the latter using the coal company as a mere device to enable the railroad company to violate the provisions of the Commodities Clause. It was expressly charged that in consequence of these facts:

"'The coal company is not a bona fide mining company, but is merely an adjunct or instrumentality of the defendant. The defendant is in legal effect the owner of and has a pecuniary interest in the coal mined by the coal company, and which is transported by the defendant.'

"Not only was it thus charged that the railroad company used its stock ownership to so commingle the operations of the affairs of the mining company with its own as to render it impossible to distinguish as a matter of fact between them, but it was, moreover, expressly, in substance, charged that, exerting its influence as the owner of all the stock of the coal company, the railroad company caused the coal company to buy up all the coal produced by other mining companies in the area tributary to the railroad, and fixed the price at which such coal was bought, so as to control the same and the transportation thereof, and establish the price at which the coal thus ostensibly acquired by the coal company by purchase should be sold when it reached the seaboard.

"It was charged that by these abuses the production, shipment, and sale of all the coal within the territory served by the railroad company was brought within the dominion of that company practically to the same extent as if it was the absolute owner of the same. Finally it was alleged as follows:

"'That by virtue of the facts hereinbefore set out and otherwise, and more particularly by virtue of the control, direction, domination, and supervision exercised by the persons who are the officers of the defendant railroad and by the defendant over all the operations of the said coal company, embracing the mining and production of said coal, the shipment and transportation of the same over the defendant railroad, and the sale thereof at the seaboard, it follows:

"'First. That the coal company, not being in substance and in good faith a bona fide corporation, separate from the defendant, but a mere adjunct or instrumentality of the defendant, the defendant, at the time of transportation, has an interest, direct or indirect, in a legal or equitable sense, in said coal.

"'Second. That said coal of said coal company is mined and produced under the authority of defendant, and the defendant at the time of transportation and before the act of transportation has not in good faith dissociated [244] itself from all exercise of authority over said coal, but continues to exercise authority over said coal at the time of transportation and over the subsequent sale thereof.'"

The Circuit Court refused permission to make this amendment—the refusal apparently resting upon the ground that

the amendment added nothing essentially new to the original cause of action—and again entered a final decree against the Government. Thereupon another appeal was taken to the Supreme Court, and the court held (*United States* v. *Lehigh Valley Co.*, 220 U. S. 257, 31 Sup. Ct. 387, 55 L. Ed. 458 et seq.) that the amendment should have been allowed, declaring that the additions thereby proposed to the original bill were not foreclosed by the decision in the Delaware & Hudson Company's case. After summarizing the amendment in the words quoted above, the Chief Justice went on to say (220 U. S. 271, 31 Sup. Ct. 390 [55 L. Ed. 458]):

"While that decision expressly held that stock ownership by a railroad company in a bona fide corporation, irrespective of the extent of such ownership, did not preclude a railroad company from transporting the commodities manufactured, mined, produced, or owned by such corporation, nothing in that conclusion foreclosed the right of the Government to question the power of a railroad company to transport in interstate commerce a commodity manufactured, mined, owned, or produced by a corporation in which the railroad held stock and where the power of the railroad company as a stockholder was used to obliterate all distinctions between the two corporations; that is to say, where the power was exerted in such a manner as to so commingle the affairs of both as by necessary effect to make such affairs practically indistinguishable and therefore to cause both corporations to be one for all purposes. To what extent the amendment charged this to be the case will become manifest by again particularly considering its averments concerning the use by the railroad company of the coal company as a purchaser of coal, as also the direct charge made in the proposed amendment that by such acts the railroad company was enabled to control all or a greater portion of the coal produced in the region tributary to its road, and thus to dominate the situation and fix the price not only at which all the coal could be bought, but at which it could be sold at the seaboard for consumption.

"That the facts thus averred and the other allegations contained in the proposed amended bill tended to show an actual control by the railroad company over the property of the coal company, and an actual interest in such property beyond the mere interest which the railroad company would have had as a holder of stock in the coal company, is we think clear. The alleged facts, therefore, brought the railroad company, so far as its right to carry the product of the coal company is concerned, within the general prohibitions of the Commodities Clause, unless for some reason the right of the railroad company to carry such product was not within the operation

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of that clause. The argument is that the railroad company was so excepted, because any control which it exerted or interest which it had in the product of the coal company resulted from its ownership of stock in that company, and would not have existed without such ownership. The error, however, lies in disregarding the fact that the allegations of the amended bill asserted the existence of a control by the railroad company over the coal corporation and its product, rendered possible, it is true, by the ownership of stock, but which was not the necessary result of a bona fide exercise of such ownership, and which could only have arisen through the use by the railroad of its stock ownership for the purpose of giving it, the railroad company, as a corporation for its own corporate purposes, complete power over the affairs of the coal company, just as if the coal company were a mere department of the railroad. Indeed, such a situation could not have existed, had the fact that the two corporations were separate and distinct legal entities been regarded in the administration of the affairs of the coal company. Granting this to be the case, however, it is in [245] effect urged, as the railroad company held all the stock in the coal company, and therefore any gain made or loss suffered by that company would be sustained by the railroad company, no harm resulted from commingling the affairs of the two corporations and disregarding the fact that they were separate juridical beings, because ultimately considered they were but one and the same. This, however, in substance but amounts to asserting that the direct prohibitions of the Commodities Clause ought to have been applied to a case of stock ownership particularly to a case where the ownership embraced all the stock of a producing company, and therefore that a mistake was committed by Congress in not including such stock ownership within the prohibitions of the Commodities Clause. We fail, however, to appreciate the relevancy of the contention. Our duty is to enforce the statute, and not to exclude from its prohibitions things which are properly embraced within them. Coming to discharge this duty, it follows, in view of the express prohibitions of the Commodities Clause, it must be held that, while the right of a railroad company as a stockholder to use its stock ownership for the purpose of a bona fide separate administration of the affairs of a corporation in which it has a stock interest may not be denied, the use of such stock ownership in substance for the purpose of destroying the entity of a producing, etc., corporation, and of commingling its affairs in administration with the affairs of the railroad company, so as to make the two corporations virtually one, brings the railroad company so voluntarily acting as to such producing, etc., corporation within the prohibitions of the Commodities Clause. In other words, that by operation and effect of the Commodities Clause there is a duty cast upon a railroad company proposing to carry in interstate commerce the product of a producing, etc., corporation in which it

has a stock interest not to abuse such power so as virtually to do by indirection that which the Commodities Clause prohibits, a duty which plainly would be violated by the unnecessary commingling of the affairs of the producing company with its own, so as to cause them to be one and inseparable."

It will be observed that (for the purpose of deciding whether the Government's motion should have been allowed) the Supreme Court necessarily assumed that the averments of the proposed amendment were true, and while a summary of these averments has already been given it may therefore be useful to give the full text in the margin.[a]

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[a] "The defendant [the Lehigh Valley Railroad Company] continuously for several years last past has been and now is the owner of the entire capital stock of the Lehigh Valley Coal Company, hereinafter called the 'Coal Company,' a corporation of the State of Pennsylvania, which holds by conveyances and leases anthracite coal lands and coal mines situated in the counties of Carbon, Lehigh, Luzerne, and Wyoming, in the State of Pennsylvania, which mines have been and are being operated in the mining of coal, and are tributary to the lines of transportation operated by the defendant, and the coal so mined has been and is being carried by the defendant over its said lines of transportation. There have been and are a large number of other companies and individuals situated in the same localities and engaged in the mining of such anthracite coal and in shipping the same over the lines of transportation owned by the defendant to markets in other States in competition with each other and the Coal Company.

"The Coal Company is so organized and controlled by the defendant and its affairs are so conducted as to make it merely an instrumentality or adjunct of the defendant. That the Coal Company is a mere adjunct, instrumentality or department of the defendant appears from the following facts, among others:

"For a long time past the defendant has owned and now owns the entire capital stock of the Coal Company.

"For a long time past the officers of the defendant have been and are now the principal officers of the Coal Company. They are appointed officers of the Coal Company through the influence of the defendant, and for the reason that they are, respectively, officers of the defendant; as officers of the Coal Company they are acting merely on behalf of and for the defendant, and under the direction and instructions of the latter.

"Specifying the officers more particularly:

"The president of the defendant, E. B. Thomas, is president of the Coal Company; the first vice president of the defendant, J. A. Middle-

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[246] We repeat that the language just quoted from the opinion in the Lehigh Valley case was used upon the assumption that the averments of the proposed amendment were true, and it is these, therefore, that were held to describe a relation, and particularly to describe a course of conduct or a series of acts, that "obliterated all distinction between the two corporations," and that so commingled their affairs "as by necessary effect to make these affairs practically indistinguishable, and thus to cause both corporations to be one for all purposes." It was held that, although a railroad company may carry in interstate com- [247] merce the

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ton, is second vice president of the Coal Company; the assistant to the president of the defendant, L. D. Smith, is assistant to the president of the Coal Company; the secretary of the defendant, D. J. Baird, is secretary of the Coal Company; the treasurer of the defendant, W. C. Alderson, is treasurer of the Coal Company; the assistant treasurer of the defendant, J. M. Baxter, is assistant treasurer of the Coal Company; the assistant secretary of the defendant, E. A. Albright, is assistant secretary of the Coal Company; the assistand treasurer of the defendant, J. William Robbins, is assistant secretary of the Coal Company.

"Of the six directors of the Coal Company, the following, to wit, George F. Baker and E. T. Stotesbury, are directors of the defendant, and J. A. Middleton and L. D. Smith are, respectively, first vice president and assistant to the president of defendant.

"E. B. Thomas, E. T. Stotesbury, and George F. Baker, who are on the executive committee of the Coal Company, are also on the executive committee of the defendant.

"The defendant, by reason of the fact that it owns the entire capital stock of the Coal Company, is enabled to and does dictate who shall be elected directors of the Coal Company, who shall be its officers and employés, and who shall be on the various committees.

"Each of the above-named officers, directors, and committee men, and others not specified, is appointed to his position in the Coal Company by reason of his holding a position with the defendant, thereby enabling him in all matters to act in the interests and on behalf of the defendant, and in the position in the Coal Company to which he has been appointed he acts in reality for and on behalf of the defendant and under the directions of the latter.

"The Coal Company uses the offices of the defendant, and the work of the Coal Company is carried on over the desks belonging to the defendant. The Coal Company, in fact, is nothing more than a department of the defendant, being operated by officers who in their princi-

product of a manufacturing, mining, producing, or owning corporation in which the railroad has a stock interest, the power given by such interest must not be abused; for the duty that rests upon the railroad not to abuse such power, "so as virtually to do by indirection that which the Commodities Clause prohibits, * * * plainly would be violated by the unnecessary commingling of the affairs of the producing company with its own so as to cause them to be one and inseparable."

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pal capacity are officers of the defendant, and by virtue of their position in the defendant control and dominate the actions of the Coal Company.

"The defendant, through its officers and directors, exercises a supervision over the coal mined by the Coal Company from the time of the mining of said coal to the sale of the same at New York and other markets. The defendant, through its officers and directors, determines how much coal the Coal Company shall mine, it dictates the shipment and transportation of said coal over its own lines, and it fixes, regulates, and determines the price at which the Coal Company shall sell the coal at the Atlantic seaboard and other places to which it has been transported over the lines of the defendant or at the dictation of the defendant.

"Acting under the direction and instructions of the defendant, and of its officers and directors, the Coal Company has entered and is entering into contracts with other companies and individuals, producers, and miners of coal, and tributary to the lines of transportation owned by defendant and to other railroads, for the purchase of the coal mined by said companies and individuals. The defendant causes this coal to be shipped and transported over its own lines, and, acting through the Coal Company, it fixes and determines the prices at which such coal shall be sold after transportation to the Atlantic seaboard and other markets. The Coal Company as a rule loses money on these transactions, as the amounts received by it for the coal which it has bought from such companies and individuals generally do not equal the price paid by it for the coal plus the cost of transportation to market. The purpose of the defendant in compelling the Coal Company to enter into such contracts with other coal companies and individuals is thereby to remove the competition which would otherwise exist between the coal mined and sold by such companies and the coal controlled by the defendant through the Coal Company, and, furthermore, to enable the defendant by means of these contracts to dictate the transportation of such coal over its own lines and to obtain the freight charged therefor.

"The Coal Company has not paid any dividends upon its stock during the time such stock has been owned by the defendant. It has been furnished millions of dollars by the defendant, which it has never re-

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[248] The opinion in the Lehigh Valley case was delivered in April, 1911, and the Reports of the Attorney General for 1911 and 1912 contain references to the subject. In the Report for 1911 the two decisions of the Supreme Court are thus referred to:

"As stated in my last annual report, after the decision in the original Commodities Clause case (*U. S.* v. *Delaware & Hudson Company*, 213 U. S. 366 [29 Sup. Ct. 527, 53 L. Ed. 836])—in which the Supreme Court, while sustaining the validity of that provision in the Hepburn Act of 1906 (34 Stat. 584) which prohibits the transpor-

funded, and upon which during many years it paid no interest. The defendant has guaranteed bonds of the Coal Company, and paid interest on such bonds. The earnings of the defendant received for the transportation over its lines of the coal produced by the Coal Company and of the coal controlled by means of the contracts above described compensates the defendant for the failure of the Coal Company to pay dividends on its stock.

"The operation of the Coal Company by the defendant in effect merely is a device for evading the law, and more particularly the provisions of the said Commodities Clause. The Coal Company is not a bona fide mining company, but is merely an adjunct or instrumentality of the defendant. The defendant is in legal effect the owner of and has a pecuniary interest in the coal mined by the Coal Company, and which is transported by the defendant.

"That by virtue of the facts hereinbefore set out and otherwise, and more particularly by virtue of the control, direction, domination, and supervision exercised by the persons who are the officers of the defendant railroad and by the defendant over all the operations of said Coal Company, embracing the mining and production of said coal, the shipment and transportation of the same over the defendant railroad, and the sale thereof at the seaboard, it follows:

"First. That the Coal Company, not being in substance and in good faith a bona fide corporation, separate from the defendant, but a mere adjunct or instrumentality of the defendant, the defendant, at the time of transportation, has an interest, direct or indirect, in a legal or equitable sense in said coal.

"Second. That said coal of said Coal Company is mined and produced under the authority of defendant, and the defendant at the time of transportation and before the act of transportation has not in good faith dissociated itself from all exercise of authority over said coal, but continues to exercise authority over said coal at the time of transportation and over the subsequent sale thereof.

"Therefore the transportation of said coal by the defendant in the manner and under the circumstances hereinabove described constituted a violation of the fifth paragraph of the first section of said 'act to regulate commerce,' as amended by an act of Congress approved June 29, 1906."

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tation in interstate commerce by a carrier of a commodity produced or owned by it, etc., except such as may be necessary in the conduct of its business, held, however, that a carrier was not the owner of an interest in articles manufactured, mined, produced, or owned by a corporation whose stock was owned by it, within the meaning of the statute—the Government applied to the Circuit Court for leave to file an amended bill, which was denied, whereupon an appeal was taken to the Supreme Court from that decision. In substance, the Government by its proposed amendment averred that, in the particular case at bar, the railroad company was not only the owner of all the stock issued by a coal company, but that it so used the power resulting from this stock ownership as to deprive the coal company of all real independent existence, and to make it virtually but an agency, or dependency, or department, of the railroad company. In other words, to employ the language of the court:

"'In great detail facts were averred which tended to establish that there was no distinction in practice between the coal company and the railroad company, the latter using the coal company as a mere device to enable the railroad company to violate the provisions of the Commodities Clause.'

"The Supreme Court, on this showing, reversed the order of the Circuit Court and remanded the case, with instructions to permit the amendment to be filed, because the facts, if proven, would bring the railroad company, so far as its right to carry the product of the coal company was concerned, within the general prohibitions of the Commodities Clause. Accordingly, the Government is proceeding in the Circuit Court, endeavoring to apply the prohibitions of the Commodities Clause to the carriage by a railroad company over its line of coal mined and owned by a coal company every share of the stock of which is owned by the railroad company, and which is operated as a department of the railroad company."

And in the Report for 1912 the following statement will be found on pages 23 and 24:

"Following the decision in the case of *United States* v. *Lehigh Valley Railroad Company*, referred to in my last annual report (220 U. S. 257 [31 Sup. Ct. 387, 55 L. Ed. 458]), remanding the case to the Circuit Court with instructions to allow the Government to amend its complaint in order to show that the Lehigh Valley Coal Company was in fact a mere adjunct, instrumentality, or department of the railroad company, and therefore that ownership of the coal by the coal company at the time of transportation amounted in reality to ownership by the railroad company, and was transported in violation of the Commodities Clause of the Commerce act (34 Stat. 584), the railroad company filed an answer to the amended complaint putting its allegation in issue. Subsequently, however, the railroad company caused to be incorporated under the laws of New Jersey a separate company

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known as the Lehigh Valley Coal Sales Company, with an authorized capital stock of $10,000,000, of which $6,060,800 was issued forthwith. The Lehigh Valley Railroad Company declared a dividend in January, 1912, of 10 per cent on its outstanding capital stock. This dividend amounted in the aggregate to $6,060,800. The preferred and common stockholders of the railroad company were given the privilege of subscribing to shares of the sales company to an amount equivalent to 10 per cent of their holdings. By this method, in effect, the shares of the sales company were distributed to and among the shareholders of the railroad company. Thereupon, on March 1, 1912, the Lehigh Valley Coal Company entered into a contract with the Lehigh Coal Sales Company whereby the for[249]mer agreed to sell to the latter all coal thereafter mined by it from all coal lands owned or leased by it, together with all coal it may purchase, the sales company agreeing to purchase and take all such coal at a price delivered f. o. b. railroad cars, at the breakers where the same is prepared, at, for all sizes above pea coal, a sum equal to 65 per cent of the general average f. o. b. price of said sizes received at the water points at or near New York, between Perth Amboy and Edgewater.

"The situation is, therefore, that coal which is shipped over the Lehigh Valley Railroad is mined by the Lehigh Valley Coal Company, all of whose stock is owned by the railroad company, and is sold at the breakers to the Lehigh Valley Coal Sales Company, all of whose stock has been originally issued to and distributed among the stockholders of the railroad company pro rata, but which company has separate officers from the railroad company, and separate directors, and whose stock may be sold by the stockholders without regard to their continued holding of stock in the railroad company. By this arrangement both the railroad company and the coal companies seem to have parted in good faith with title to the coal before transportation begins, and it is claimed, therefore, that transportation is free from the prohibition of the Commodities Clause as construed by the Supreme Court in 213 U. S. 412 [29 Sup. Ct. 527, 53 L. Ed. 836]. The question will be submitted to the court at an early day."

[1] In the following month, on January 27, 1913, the amended bill in the Eastern district of Pennsylvania was dismissed with the Government's consent, but without prejudice to the right to bring a new suit. We understand that such a suit has recently been brought in the second circuit. The foregoing résumé states in sufficient detail the course of the previous litigation against the coal-carrying roads and brings us to the present dispute. The rules to which we have referred are now to be applied to the relation existing and to the course of conduct actually pursued between the Delaware, Lackawanna & Western Railroad Company and the

Delaware, Lackawanna & Western Coal Company, and we are to determine whether the facts establish that the power of the Railroad Company has been "used to obliterate all distinctions between the two corporations"; or (to employ other language of the court) whether the power of the Railroad Company has been "exerted in such a manner as to commingle the affairs of both as by necessary effect to make such affairs practically indistinguishable, and therefore to cause both corporations to be one for all purposes." If the railroad has the power to attain the objects thus condemned, and if these objects have been attained by the actual use and exertion of the power, the Commodities Clause has been violated; otherwise, it has not been infringed.

It will be a help in appreciating the evidence now under consideration if we first take some account of the general situation in the anthracite region of Pennsylvania. This is well described in a paragraph from page 224 of 164 Fed., afterwards quoted by the Supreme Court in the Delaware & Hudson case, at page 402 of 213 U. S., at page 530 of 29 Sup. Ct. (53 L. Ed. 836):

"The general situation is that for a half century or more it has been the policy of the State of Pennsylvania, as evidenced by her legislative acts, to promote the development of her natural resources, especially as regards coal, by encouraging railroad companies and canal companies to invest their funds in coal lands, so that the product of her mines might be conveniently and profitably conveyed to markets in Pennsylvania and in other States. Two of the defendant corporations, as appears from their answers, were created by the Legislature of Pennsylvania, one of them three-quarters of a century ago and [250] the other half a century ago, for the express purpose that its coal lands might be developed and that coal might be transported to the people of Pennsylvania and other States. It is not questioned that, pursuant to this general policy, investments were made by all the defendant companies in coal lands and mines, and in the stock of coal-producing companies, and that coal production was enormously increased and its economies promoted, by the facilities of transportation thus brought about. As appears from the answers filed, the entire distribution of anthracite coal in and into the different States of the Union and Canada for the year of 1905 (the last year for which there is authoritative statistics) was 61,410,201 tons; that approximately four-fifths of this entire production of anthracite coal was transported in interstate commerce over the defendant railroads from Pennsylvania to markets in other States and Canada; and of this four-

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fifths, from 70 per cent to 75 per cent was produced either directly by the defendant companies or through the agency of their subsidiary coal companies. It also appears from the answer filed that enormous sums of money have been expended by these defendants to enable them to mine and prepare their coal and to transport it to any point where there may be a market for it. It is not denied that the situation thus generally described is not a new one, created since the passage of the act in question, but has existed for a long period of years prior thereto and that the rights and property interests acquired by the said defendants in the premises have been acquired in conformity to the constitution and laws of the State of Pennsylvania, and that their right to the enjoyment of the same has never been doubted or questioned by the courts or people of that commonwealth, but has been fully recognized and protected by both."

In addition to these considerations the following facts—also taken from the Delaware & Hudson case, in 164 Fed. on page 221—were especially applicable then to the railroad company now defendant, and may be referred to again as relevant to a large extent in the present controversy:

"The Delaware, Lackawanna & Western Railroad Company, like the Delaware & Hudson Company, admits that it is the owner of coal lands and mines coal, which it sells; that it was organized under an act of the Legislature of Pennsylvania in 1849 (act of Feb. 19, 1849 [P. L. 79]); that all the lines of railroad owned by it are wholly within the State of Pennsylvania, extending from the Delaware River, at the boundary line of the State of New Jersey, in a northwesterly direction across the State of Pennsylvania, to the boundary line between the State of Pennsylvania and the State of New York, with a branch line extending from Scranton in the State of Pennsylvania, to Northumberland, in said State. Said defendant also admits and alleges that, under express authority of acts of the Legislature of the States of Pennsylvania, New Jersey, and New York, it, as lessee, now operates, and long prior to May 1, 1908, had operated, various lines of railroad in the two last-mentioned States, by which it has direct traffic connection with the city of Buffalo and other cities in the said States. Defendant also admits that for many years it has owned, in fee, extensive tracts of coal land in the State of Pennsylvania; that it has also leased large tracts of coal lands in the said State, and is now engaged, and for many years last past has been engaged, in mining coal from the lands so owned and leased by it; that the holding of said lands, whether in fee or by lease, and the mining, manufacture, and interstate transportation of the coal therefrom, has been and continues to be under and by virtue of the authority of the laws of the State of Pennsylvania; that in addition to the foregoing, certain coal companies, organized from time to time under acts of assembly of the said State

of Pennsylvania, have been merged into said defendant corporation; that by an act of the General Assembly of the State of Pennsylvania, approved April 15, 1869, entitled 'An act to authorize railroad and canal companies to aid in the development of the coal, iron, lumber, and other material interests of this Commonwealth,' the defendant was authorized to aid corporations authorized by law to develop coal, iron, lumber, and other material interests of Pennsylvania, by purchase of their capital stock or bonds, or either of them. The answer of said defend[251]ant also alleges that by reason of its ownership of said coal lands and coal and the revenues derived from the transportation of the same to market, it has been enabled to expend millions in the betterment of its general transportation facilities for both goods and passengers and give to the public the benefits of a well-constructed and equipped modern railroad; that by virtue of leases of railroads, to enable it to transport coal in interstate commerce, it has become bound to pay yearly in interest charges the sum of $5,155,697 and for taxes $1,163,916; that out of a total of about 8,700,000 tons of coal produced by it in the year 1907 from its land owned in fee and leased, upward of 6,700,000 tons were transported over its lines of railroad in interstate commerce; that from 40 per cent to 60 per cent of its annual transportation earnings from the operation of leased lines has been derived from the carriage of its own coal thereover; that it uses, in the conduct of its business as a common carrier, approximately 1,700,000 tons of anthracite coal of pea size or smaller, annually, and will require more for such use in the future; that to obtain this coal in these economic sizes, it is necessary to break up coal, leaving the larger sizes, which must be disposed of otherwise; that great waste would result if it were forbidden to transport to market in interstate commerce these large sizes thus resulting. That defendant's rights to acquire its holdings of coal land, its rights to own and mine coal, and to transport the same to market in other States, as well as in Pennsylvania, and its leases of other railroads were acquired many years prior to the enactment of the so-called 'Interstate Commerce act,' and of the said amendment thereto known as the 'Commodities Clause.'"

Turning to the record now under consideration, we find no facts of importance in dispute; the controversy is over the inferences that should properly be drawn therefrom. The relation existing between the two defendants is a direct result of the railroad's effort to obey the decision of the Supreme Court in the first of the cases referred to—*United States* v. *Delaware & Hudson Co.* When that decision was announced on May 3, 1909, the Railroad Company was presented with a serious problem. It owned or leased 15,000 acres of coal lands in the Wyoming region, and these were of

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great value, both present and prospective. Its mines were producing several million tons of coal each year, and the sale and carriage of this coal were highly important sources of revenue, and its uninterrupted distribution through the established channels of trade was of great importance to the public. It had more than 600,000 tons of mineral coal on hand, not yet disposed of, either on storage or in course of transit. A demand for the coal that the railroad had been selling for many years existed throughout a wide territory, stretching from New England into Canada and the Middle West; and an extended and elaborate organization had grown up in the course of a long and continuous effort to bring the coal to the consumer seasonably and economically. Facilities for storage and handling had gradually been acquired and expanded; numerous contracts had been made with agents and dealers; other contracts existed with independent operators for the purchase of additional coal for carriage and sale—all this, and much more, resting upon the undistributed practice of many years under direct State authority, whereby the Railroad Company mined its own coal, bought coal from others, and carried and sold in many and in widely separated markets the property thus mined and bought.

This long-established business was now to be changed, and changed almost immediately. In our opinion the evidence shows that the railroad intended to obey the law as the Supreme Court had authorita [252] tively announced it, and we may say at once that an examination of the record affords no ground to doubt the good faith of all concerned in the transactions now complained of. No trick or sham or evasion was contemplated or attempted, but a genuine effort was apparently made to comply with the statute and to carry out openly and publicly what the court had declared to be necessary. The situation was not welcome, but the railroad clearly understood it and accepted it frankly. No doubt existed that the railroad must dissociate itself in good faith from the ownership of the coal before the act of transportation should begin, and must divest itself of every interest therein, either direct or indirect. Counsel were therefore consulted and a plan was adopted. As a business propo-

sition it was evidently indispensable to find a single purchaser who should be able, financially and in other respects, to handle several million tons a year; it was obviously impracticable to dispose of such a quantity by sales in small lots to small dealers, or for small dealers to distribute afterwards to numerous consumers scattered over so wide an area. So large a quantity, needed in so many places at about the same time, could only be handled by some one with large capital and with a well-organized and capable force of agents. It was therefore decided that a New Jersey corporation should be organized, with a capital sufficiently large, and that this corporation should take over the trained and experienced clerks and agents connected with the coal sales department of the railroad's business.

It was recognized as desirable that the relations between the railroad as the seller, and the proposed coal company as the buyer, should be friendly, and in the first instance the stock in the Coal Company was offered only to the shareholders of the Railroad Company. They were expected to accept the offer, and this expectation was realized. As is well known, the defendant railroad has had a prosperous career, and in June, 1909, it had a large cash surplus. Out of this fund it declared a divident of 50 per cent, and offered to its shareholders the right to use one-half the dividend to buy the shares of the proposed Coal Sales Company at par. The offer was accepted by nearly all the shareholders; the only exceptions were 36 separate interests, representing 2,249 shares. Since that time, however, many changes have taken place among the stockholders of either company. Both stocks are dealt in by the public, one on the Exchange and the other on the curb; the result being that in October, 1913, the shares of the railroad not interested in the Coal Company had increased from 2,249 to 88,716, and the shares in the Coal Company not interested in the railroad had increased to 6,907. The number of shareholders in the Coal Company had become 1,588, and of these 801 were women, either in their own right or as cestuis que trustent.

The capital subscribed and paid in before August 2, 1909, was nearly $6,600,000, but the Railroad Company did not

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subscribe or pay for a single share, and had no interest therein, direct or indirect. The capital was all subscribed and paid for by individuals; but, as these individuals were also stockholders of the Railroad Company, the Government contends (almost solely for this reason) that the two corporations are in effect identical and cannot be regarded as dis- [253] tinct. If this ground be not well taken, scarcely anything is left of the Government's case—certainly nothing that would support a decree. But, if the contention be sound, the case is made out, and accordingly this point is much insisted upon in the brief, where numerous cases are cited and discussed. We do not think it necessary to take them up in detail. Some of them differ essentially from the case at bar in the fact that they disclose fraud or bad faith as an element, whereas here nothing of the kind exists. But we need not discuss these or any other authorities, because the Supreme Court has already declared distinctly the rule for these particular cases, and has determined that a railroad itself might lawfully hold stock in a manufacturing, mining, producing, or owning corporation, upon the single condition that the latter be a bona fide organization. In the Delaware & Hudson case—on page 415 of 213 U. S., on page 539 of 29 Sup. Ct. (53 L. Ed. 836)—the court said that while the carrier was forbidden to have any interest, direct or indirect, in a legal or equitable sense, in the article or commodity carried, nevertheless this prohibition of the statute did "not include * * * articles or commodities manufactured, mined, produced, or owned, etc., by a bona fide corporation in which the railroad company is a stockholder." This would seem to be plain enough, without more; but, as the subject was important, the court returned to it in the Lehigh Valley case and left no room for doubt. On page 266 of 220 U. S., on page 388 of 31 Sup. Ct. (55 L. Ed. 458), the Chief Justice declared that:

"The prohibitions of the statute were addressed only to a legal or equitable interest in the commodities to which the prohibitions referred; that they therefore did not prohibit a railroad company from transporting commodities mined, manufactured, produced or owned by a distinct corporation, merely because the railroad company was the owner of some or all of the stock in such corporation."

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And on page 271 of 220 U. S., on page 390 of 31 Sup. Ct. (55 L. Ed. 458), the Delaware & Hudson case is again referred to as holding expressly that:

"Stock ownership by a railroad company in a bona fide corporation, irrespective of the extent of such ownership, did not preclude a railroad company from transporting the commodities manufactured, mined, produced, or owned by such corporation."

We may therefore assert with confidence that, since a railroad itself may own stock in the producing or owning corporation without offending against the statute, no offense is committed although individual subscribers to such stock may also be stockholders in the railroad. No act of Congress or judicial decision has declared it to be illegal for an individual citizen to invest his money in two enterprises, merely because the enterprises may be closely connected. But what the Supreme Court did lay down was this: Although a railroad company may lawfully own stock in a producing or owning corporation, it must not use the power given by such ownership to obliterate the distinction between the two organizations; it must not exert such power so as to commingle indistinguishably the affairs of both, and thus cause both corporations to be one for all purposes; it must not [254] destroy the entity of the producing or owning corporation, and thus make the two virtually one. If it actually do these forbidden things, then the Commodities Clause applies and condemns as unlawful such an abuse of a lawful right. But it is the abuse that is unlawful, not the mere existence of the relation or of the right growing out of the lawful ownership of stock.

[2] Let us see, therefore, what has been actually done by the two defendants. The railroad owns no stock, and has no legal or equitable interest, in the Coal Company. As far as the evidence discloses, it has taken little, if any, corporate action, except to authorize the contract hereafter quoted. But we may fairly infer, although there is not much positive evidence on the subject, that the plan carried out was initiated and finally agreed upon by some at least—probably by all, or by a majority—of a comparatively small group of 35 persons who own a controlling interest in the railroad's stock. They (or nearly all of them, 28 or 29 being the number)

also own a majority of the Coal Company's stock, and we take it for granted that they actually control both companies. Being majority stockholders, they have a lawful right to exercise the power of control, provided they exercise it for lawful objects. We assume, also, that several other facts upon which the Government lays especial stress are due to the will of this controlling group, namely: The facts that the vice president of the Railroad Company, who was the former head of its coal department, became the president of the Coal Company; that a former sales agent of the Railroad Company transferred his services to the Coal Company and has been (and is now) its vice president and general sales agent; that the president of the Railroad Company is a member of the Coal Company's board of directors; and that three other members are sons of directors on the board of the railroad. As far as these facts go, they are pertinent to the Government's contention, and are legitimately used in the effort to prove that the two corporations are identical. But of themselves they are not sufficient; no effort has been made to show, and we do not understand the Government to suggest, that the sons (who own no stock in the Railroad Company) have been unfaithful to their trust and have betrayed the interests of the Coal Company which they help to direct; there was no serious effort to show that any of the present or former officials of the Railroad Company that are now, or have been, in the Coal Company's service, have used their power or influence improperly. And—what is more to the point in the present inquiry—nothing was offered in denial of what the evidence shows to be a fact, namely, that the Coal Company has never been favored over other shippers of coal by discrimination in rates or in practices, or in facilities or quality of service. As the Supreme Court has recently pointed out in *Railroad Company* v. *United States*, 231 U. S. 363, 34 Sup. Ct. 65, 58 L. Ed. 269, where the object of the Commodities Clause was considered, the evil at which the clause was aimed was the danger that a carrier, if he were also the owner of the goods transported, would favor himself unduly:

"If such carrier hauls for the public and also for its own private purposes, there is an opportunity to discriminate in favor of itself

against other shippers in the rate charged, the facility furnished or the quality of the service [255] rendered. The Commodities Clause was not an unreasonable and arbitrary prohibition against a railroad company transporting its own useful property, but a constitutional exercise of a governmental power intended to cure or prevent the evils that might result if, in hauling goods in or out, the company occupied the dual and inconsistent position of public carrier and private shipper."

[3] The following facts are also pertinent upon the question how far the corporate activities and the actual operations of the two companies have been distinct and separate. In August, 1909, they entered into the contract of which the Government complains. A summary of that agreement is given in the bill of complaint:

"That the Railroad Company would sell to the Coal Company all mined, marketable coal then owned, except such as it should elect to retain for use in its business as a common carrier, to be paid for within thirty days at prices designated.

"That the Railroad Company would lease the Coal Company certain described storage and stocking plants, trestles, and docks, and accept in payment 5 per cent per annum on a valuation to be agreed upon.

"That the Coal Company would take over certain leases of trestles and sale agencies contracts theretofore made by the Railroad Company.

"That the Railroad Company would sell and deliver to the Coal Company, f. o. b. cars at the breakers, all coal thereafter mined by the former from all lands owned or leased by it, together with all coal purchased by it, the amount to be so sold and delivered to be at the absolute option of the seller and without liability upon its part for failure to supply any. The Coal Company agrees to purchase all coal offered by the Railroad Company, and no other, unless necessary to comply with contracts then outstanding.

"That the railroad might retain sufficient coal for its use as a common carrier.

"That the Coal Company would accept from the Railroad Company all coal delivered on cars at the breakers, and pay for all sizes above pea 65 per cent of the general average f. o. b. prices at tide points at or near New York between Perth Amboy and Edgewater, and for the smaller sizes specified portions of such general average prices.

"That the Coal Company would conduct the business of selling so as to best conserve the interest of and preserve the good will and markets of the coal mined by the Railroad Company; that any disputes which might arise between the parties should be settled

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through a board of arbitration, made up as specified; and that the terms of the agreement itself might also be modified by arbitration if conditions justified.

"That the contract should continue to be operative until six months after either party shall notify the other in writing of its intention to cancel the same, and that upon its expiration the Coal Company would sell to the Railroad Company and the latter would buy all coal then stored or in transit theretofore purchased by the former at prices to be agreed upon or fixed by arbitration."

The full text of the contract will be found in the margin.*

Since August 2, 1909, when this contract was made, the general course of events may be condensed from the testi-

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* "This contract, entered into this second day of August, 1909, between the Delaware, Lackawanna & Western Railroad Company, hereinafter called the 'seller,' of the first part, and the Delaware, Lackawanna & Western Coal Company, hereinafter called the 'buyer,' of the second part, witnesseth:

"Whereas, the seller is the owner of coal lands situated at various points in the counties of Luzerne and Lackawanna, and the State of Pennsylvania, and has been engaged both in mining the coal therefrom and in transporting to market and selling the same, and in like manner has so transported and sold large amounts of coal purchased by it in said State; and whereas, the seller, to so sell its coal, has constructed storage plants and trestles at various points in different States, and has entered into various sales agency contracts; and whereas, to so market said coal most of the same must be transported in interstate commerce, so that it has become necessary for the seller, in compliance with law, to sell all of its coal within the State of Pennsylvania; and whereas, the buyer is desirous of contracting to so purchase all of the seller's coal at its mines, to contract for the transportation of the same to market, and to sell the same and for such purpose to lease of the seller various of its storage plants, trestles, offices, and other facilities, and assume its selling agency contracts:

"Now, therefore, in consideration of the premises, and of the mutual covenants herein contained, it is agreed as follows:

"First. The seller agrees to sell to the buyer, and the buyer agrees to buy of the seller, all mined, marketable coal wherever situated now owned by the seller, and either stored, held at various points, or in the course of transportation, except such coal as the seller elects to retain for its use in the conduct of its business as a common carrier. The buyer shall pay the seller therefor, in cash within thirty days from the date hereof, as follows, viz: For all of the coal in transit, at prices to include the full tariff charges of the seller and of all other carriers whose charges have been paid by the seller for the

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mony of the prin[256]cipal witness in the case: Since that date, the Coal Company has conducted the whole business of marketing the coal referred to in the contract, and the

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transportation of such coal from the mines, together with the market value thereof at the mines as fixed herein, at prices prevailing for the month of July, 1909; for all coal stored, of all sizes, at points west and north of Buffalo, N. Y., the sum of five dollars and fifty cents ($5.50) per gross ton; for prepared sizes of coal stored at Buffalo and at other points along the lines of the owned, leased, and controlled lines of the seller, the sum of four dollars ($4.00) per gross ton; for sizes smaller than prepared sizes so stored at Buffalo and points east, along the lines of the seller, not including that stored at or about the mines of the seller, the sum of one dollar ($1.00) per gross ton The buyer shall also pay an equitable proportion of taxes for the year 1909 assessed or to be assessed against such stored coal

"The buyer hereby assumes and agrees to pay all unpaid charges of every nature incurred in connection with the transportation or storage of said coal, and hereby assumes all risks and obligations in connection therewith from the beginning of the day of the date hereof.

"Second. The seller shall lease to the buyer contemporaneously herewith, the following properties: The Checktowage stocking plant, at Buffalo, N. Y.; the Port Morris storage plant, at Port Morris, N. J.; the Dover stocking plant, at Dover, N. J.; the Erie Street lake trestle, at Buffalo, N. Y.; the transfer trestle, at East Buffalo, N. Y.; the lake shipping trestle, at Oswego, N. Y.; the canal trestle, Clinton Street trestle, and Geddes yard trestle, at Syracuse, N. Y.; the canal trestle, at Utica, N. Y.; the retail trestles located, respectively, at Newark, Harrison, Bloomfield, Summit, and Paterson, N. J.; the Division Street dock trestle, at Chicago, Ill.; the Wabash dock trestle, at Toledo, Ohio. The rental to be paid the seller by the buyer for the use of said properties shall be five per cent (5 per cent) of their agreed value, including good will, and the leases shall provide that the buyer shall keep the said properties insured and in repair, and shall contain such other covenants as may be proper to protect the interests of the seller.

"The seller has leased certain of its trestles to different persons, as follows: The Main Street, Erie Street, Chicago Street, Seneca Street, Walden Avenue, and Black Rock trestle at Buffalo, N. Y., to E. L. Hedstrom; the McKinney trestle at Binghamton, N. Y., the Chemung Coal Company trestle at Elmira, N. Y., the Oswego Coal Company trestle at Oswego, N. Y., the Gilmore trestle at Utica, N. Y., the Herre trestle and elevator on Pier 5, Hoboken, N. J., Burns Brothers' trestle on property of the seller at South Brooklyn, N. Y., the Klink trestle at Syracuse, N. Y., a coal trestle at Bath, N. Y., and

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railroad has taken no part therein, except to move the coal in obedience to orders received from the Coal Company. Notice of the change of business was promptly given to

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various other trestles located on the lines of its owned, leased, and controlled lines.

"The seller has also entered into sales agency contracts, as follows: With E. L. Hedstrom & Co., Chicago, Ill., S. C. Schenck, Toledo, Ohio, Northwestern Fuel Co., St. Paul, Minn., Milwaukee Western Fuel Co., Milwaukee, Wis., E. L. Hedstrom, Buffalo, N. Y., and Ogdensburgh Coal & Towing Company, of Ogdensburgh, N. Y.

"All of such leases and sales agency contracts shall be taken over by the buyer as of the date hereof, on terms to be agreed upon, and it shall assume all obligations of the seller with respect thereto, and be entitled to the benefits thereof. The buyer also agrees to lease of the seller the coal sales office building at Buffalo and Syracuse, N. Y., rooms in the station of the seller at Scranton, Pa., and suitable quarters at 90 West Street, New York City.

"The seller will provide that any of the foregoing properties so to be leased to the buyer which are owned by the Syracuse, Binghamton & New York Railroad Company shall be so leased to it by such corporation.

"The seller has also entered into contracts for the sale of coal for the current year with various customers. A schedule of such contracts shall be prepared and furnished to the buyer by the seller. All of such sales contracts shall be assumed by the buyer as of the date hereof, and it agrees to comply with the terms and conditions of such contracts. The buyer also agrees to assume the obligations of a certain contract entered into October 8, 1905, between Lucy A. Turner and the seller in connection with the business of Henry B. Turner Coal Company at foot of East 23d Street, New York, and shall be entitled to the benefits thereof without other consideration than that named herein.

"The seller has entered into a contract, dated June 17, 1905, expiring August 1, 1910, with the Solvay Process Company, of Syracuse, N. Y., providing for the sale of washery coal at prices named therein. It is understood that the buyer shall assume such contract and supply said company with coal at prices named therein. The seller, however, agrees that as the buyer can not conform to the conditions of such contract without a material loss, it will adjust such loss with the buyer upon an equitable basis on terms to be agreed upon.

"Third. Subject to the conditions of this paragraph, and at the prices herein stated, the seller agrees, during the terms of this contract, to sell to the buyer all coal hereinafter mined by it from all coal lands owned or leased by it, together with all coal it may purchase. The buyer agrees to purchase all such coal at such prices and to pay

agents and customers and the trade in general. The railroad sells all its coal to the Coal Company on board cars at the breakers, except such quantity as it uses for its own

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the seller therefor in cash on the 20th of each month for all coal delivered to it by the seller f. o. b. cars at the mines during the preceding month. The buyer also agrees on the 15th of each month to pay the seller in cash all tariff charges of its owned, leased, and controlled lines, and all moneys advanced by it to other carriers for the transportation of said coal during the preceding month.

"The amount of coal to be so delivered and sold to the buyer by the seller shall be at the absolute option of the seller as its interests may determine, and the seller shall be subject to no liability whatsoever for failure to supply the buyer with such amount of coal as it may desire. The buyer agrees that, except to enable it to comply with the terms of the existing hereinbefore cited sales agency and other sales contracts of the seller, in the event of the failure of the seller to sell it coal, it will purchase all coal to be sold by it from the seller, and will purchase no coal from any other person or corporation, except with the written consent of the seller.

"The seller reserves the right to retain all coal required by it for the use of its owned, leased, and controlled lines in the conduct of their business as common carriers; also such coal as it may desire to sell its employés at the breakers, the same not to be hauled in railroad cars.

"The buyer agrees to pay the seller, and the seller agrees to accept from the buyer, the following prices for said coal, to be delivered f. o. b. railroad cars at the various breakers now located and hereinafter constructed by the seller at its mines aforesaid:

"For all sizes above pea coal, sixty-five (65) per cent of the general average free on board prices of said sizes received at tide points at or near New York, between Perth Amboy and Edgewater.

"For pea coal, fifty (50) per cent of the general average f. o. b. price for pea coal at said tide points at or near New York, when the said price is two dollars and fifty cents ($2.50) per ton or less, and for each advance of ten (10) cents per ton in the said f. o. b. price above two dollars and fifty cents ($2.50) the proportion paid the seller shall be increased one (1) per cent until the percentage paid for pea coal reaches sixty-five (65) per cent.

"For buckwheat coal No. 1, forty (40) per cent of the general average f. o. b. price at said tide points at or near New York when the said price is two dollars ($2.00) per ton or less, and for each advance of ten (10) cents per ton in the said f. o. b. price the proportionate price paid the seller shall be increased two (2) per cent until the said f. o. b. price reaches two dollars and fifty cents ($2.50), after which the proportionate price paid the seller shall advance one (1) per cent for each ten (10) cents advance in the f. o. b. price above two dollars and fifty

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purposes, or permits to be used by its employés. But the Coal Company buys coal from other persons also, the quantity [257] being 3,847 tons in 1909, 2,267 tons in 1910, 6,600

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cents ($2.50), as in the case of pea coal above mentioned: Provided, That nothing herein contained shall oblige the buyer to pay for buckwheat No. 1 coal a rate higher than for pea coal.

"For all sizes smaller than buckwheat No. 1, the seller shall receive twenty-five (25) cents per ton f. o. b. railroad cars at breakers, and for each ten (10) cents increase in the general average f. o. b. price above one dollar and thirty cents ($1.30) a ton at tide the price shall be increased five cents per ton.

"The general average f. o. b. prices herein referred to shall be determined by the general average free on board prices received for the various sizes on general market sales thereof at tide points at or near New York between Perth Amboy and Edgewater during each calendar month, and a statement of such prices shall be furnished the buyer by the seller prior to the 8th day of each month subsequent to that in which such monthly sales shall have been made—the intent of this provision being to ascertain and to fix the market price of the coal at the mines as nearly as may be as of the several and respective days of delivery of the coal at the mines.

"Payment on the 20th day of each month for coal purchased during the preceding month shall be made at such prices.

"Fourth. The seller agrees that all its coal sold to the buyer shall be properly prepared for market in accordance with the past practice and standards of the seller.

"Fifth. The buyer agrees that at any transfer trestles leased to it by the seller it will transfer from car to car any coal which the seller desires to have transferred, at a price to be agreed upon. It is also understood that the parties hereto shall adjust the charges to be paid by the buyer to the seller for coal forwarded to and unloaded from storage or stocking plants and with respect to other transportation charges to be subsequently covered by tariffs to be filed by the seller.

"Sixth. The buyer agrees that it will conduct the business of selling the coal of the seller in such manner as best to conserve the interests of and preserve the good will and markets of the coal mined by the seller, and to continue to fill the orders of all responsible present customers of the seller, even though as to some of such customers the sales may be unprofitable; it being understood and agreed that at the prices above quoted the entire business of the buyer will be conducted at a profit.

"Seventh. In the event of dispute as to tidewater prices or as to the proper interpretation of any provision of this agreement, or if by reason of changes in market conditions, tariff rates or otherwise, modifications or changes in this contract should fairly be made, and the parties hereto cannot agree with respect to such modifications or

tons in 1911, 9,204 tons in 1912, and 310,645 tons in the first 10 months of 1913. The Coal Company directs the movement of the coal from the breakers (where the title passes from the Railroad Company) until it reaches the numerous markets and customers in Pennsylvania and elsewhere; and the railroad obeys these orders. With the exceptions already noted, the Coal Company has always had a separate board of directors and separate officers. The actual management has also been separate and distinct. The Coal Company has its own officers, and keeps its [258] own books according to its own method of book-keeping, and its books relate to its own business. Its funds are deposited in its own name in banks of its own choosing, and are subject to its own disposal. Its earnings are computed from its own books, and the profits go solely to its own stockholders. The sales department of the Coal Company is mainly controlled by

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changes, or if the parties cannot agree as to any matter, it is agreed that all such differences shall be determined by arbitration by a board of arbitrators to consist of one person selected by the general sales agent of the buyer, and one person selected by the president of the seller, and a third person to be selected by the then president of the Farmers' Loan & Trust Company of the City of New York, and that the decision of a majority of such board of arbitration shall be final and binding upon the parties hereto.

"Eighth. Any changes or modifications in the terms, conditions, or covenants of this contract which may hereafter be agreed to may be made by written agreement, duly executed, provided the same be approved by a vote of both the parties hereto acting by a majority of their several boards of directors or managers.

"Ninth. This contract shall become in effect on the beginning of the day of the date hereof. Upon written notice by either party to the other prior to August 1, 1910, of its intention to cancel this contract, it shall expire at midnight on the 28th day of February, 1911. Should no such notice be served, the contract shall continue to be operative until the expiration of six months after either party shall notify the other in writing of its intention to cancel the contract, in which event it shall expire at midnight of the last day of the six months named in the notice of cancellation.

"Upon the expiration of this contract, the buyer agrees to sell to the seller or to whomever the seller shall nominate, and it agrees to buy or cause to be bought, all coal then stored or in transit purchased of the seller by the buyer, at prices to be agreed upon; or in case the parties cannot agree, to be fixed by arbitration as herein provided."

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its vice president and general sales agent, although its president takes some part in the supervision. The sales agents throughout the territory served with the coal are and always have been in the exclusive employ of the Coal Company, and are paid solely by that company. And this is true, also, of the book-keeping force in the [259] Coal Company's offices. The Government has had access to the books and accounts of the Coal Company, and has offered some extracts therefrom in evidence. The Coal Company has been charged, and has paid, the same rates of freight and demurrage as any other shipper, and has received no discriminating favors from the railroad. The transactions of the Coal Company for each of the years 1910, 1911, and 1912, embrace 8,000,000 tons or more, and about $40,000,000.

The Coal Company pays large sums in cash each year to the railroad for coal purchased and for freight. In 1912 the amount paid for coal was nearly $20,000,000, and for freight more than $13,000,000; in 1910, the total of these items was about $34,500,000; and in 1911, $35,000,000. In addition to these sums, the Coal Company paid to other carriers, and to agents for salaries and other charges, from $2,-[260] 500,000 to $3,000,000 in each of the years named. For all purposes, the Coal Company has paid, to others than the railroad, more than $7,000,000 in 1910, and also in 1911, and more than $5,000,000 in 1912.

A rental of 5 per cent on the estimated cost of the railroad's former storage and trestle facilities is paid by the Coal Company, together with the cost of operation and maintenance. Since August, 1909, the Coal Company has been buying other property at various places—mainly land, buildings, and trestles—at a cost of several hundred thousand dollars, and has been making contracts on its own account to supply certain agents with coal for a definite number of years. It obtains some of its coal from other sources of supply than the Railroad Company, although the railroad is by far the most important source. And, finally, it may be noted that several unadjusted differences exist between the two companies, one being the railroad's claim to receive a higher price for its coal.

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We are asked to hold that the facts thus set forth do not establish the good faith of the railroad, and therefore to decree that the company's interest in the coal transported continues to exist, in spite of the contract of August 2, 1909, and of the whole course of conduct hereinbefore detailed. The Government prays that we enjoin the defendant from "shipping, transporting, or causing to be transported, any anthracite coal, the product of mines owned by defendant railroad company, or purchased by it from others, and sold, transferred, or delivered to defendant coal company, in pursuance of the above-described agreement or arrangement existing between them, or any similar one." Manifestly, a decree that goes so far and would destroy so much should rest upon well-established facts, and these in our opinion have not been proved; the evidence is too slender to justify us in drawing the inferences urged by the Government. On the contrary, believing that we have fairly stated the uncontroverted facts, we shall only add that they appear to lead to these conclusions: That the transactions between the two companies began and have been carried on in good faith, in obedience to the decisions of the Supreme Court and in reliance thereon; that the distinction between the two corporations has not been obliterated; that their affairs have not been so commingled as by necessary effect to make their affairs indistinguishable; and that the two are not one for all purposes, but are two distinct and separate legal beings, actually engaged in separate and distinct operations. It follows that the railroad does not own the coal in question, either in whole or in part, during its carriage, but has in good faith dissociated itself therefrom before the beginning of the act of transportation.

2. But the Government contends, further, that the Railroad Company retains a direct or indirect interest in the larger sizes of the coal while it is being transported, because the contract contained a provision relating to the price to be paid for these sizes. Coal larger than pea is called "prepared" coal, and for this size the third paragraph of the contract provides that the Coal Company shall pay "sixty-five (65) per cent of the general average free-on-board prices

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of said sizes received at tide points at or near New York between Perth Amboy and Edgewater."

[261] The same paragraph makes somewhat similar provisions for ascertaining the prices to be paid for the smaller sizes; these are also to be paid for on the basis of certain percentages of the general average free-on-board prices at tide. It is not contended, however, that the railroad retains any interest in these smaller sizes; the argument is restricted to "prepared" coal, or sizes larger than pea. It is urged that the railroad will be the gainer by a high price at tide, since this will necessarily increase the price at the mines, and, therefore, that this interest in the price is such an interest in the coal itself as is condemned by the statute. Undoubtedly it is correct to say that the railroad has an interest in the price; but it should be understood that "interest" merely means that the railroad will gain by a higher price at tide, and does not mean that the railroad has power to control the coal or the price for which it sells. It might also be argued—and, indeed, the suggestion is glanced at in the Government's brief—that the price at tide is also affected by the rate of freight, and therefore that the railroad retains an interest in the coal because it can increase the tidewater price by increasing the rate of freight. In theory this argument may be sound, but as a practical consideration it is not entitled to weight, because the railroad can not increase the rate of freight at pleasure, but must accept whatever rate is established by the Interstate Commerce Commission. And the other argument, while equally good in theory, is equally ineffective as a practical consideration, because the Railroad Company does not control the price at tide, and can not increase that price, however much it may desire to do so. The Railroad Company does not fix prices; it does not decide how much coal is to go to New York Harbor; and it does not determine the sum for which the coal is to be sold at that point. The average price at tide had its origin a good many years ago, when the coal-carrying roads had contracted with numerous mine owners to buy their coal at certain precentages of the average selling price at the harbor. In order to determine what that price was,

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records were kept by a bureau organized for that purpose, showing the quantities sold and the prices. This was the situation in 1902, when the notable strike in the anthracite region took place, and one of the terms of the award that settled that struggle was a sliding scale of wages to be determined by reference to the selling prices reported by the bureau. These prices have been so reported ever since, in accordance with the order of the strike commission, and wages have been computed by reference thereto.

This price at tide afforded the present defendants a convenient basis for calculation. It has certain obvious advantages; the market in New York Harbor is very large, probably the largest single market available; it is served by all the principal coal companies; and the general average of prices obtained there may fairly be regarded as an accurate measure of value at that point. But the purpose of the third paragraph of the contract was to value the coal at the breakers, and the New York price merely afforded a starting point for the computation. The contract declares this purpose distinctly:

"The general average f. o. b. prices herein referred to shall be determined by the general average free-on-board prices received for the various sizes on general market sales thereof at tide points at or near New York between [262] Perth Amboy and Edgewater during each calendar month, and a statement of such prices shall be furnished the buyer by the seller prior to the 8th day of each month subsequent to that in which such monthly sales shall have been made—the intent of this provision being to ascertain and to fix the market price of the coal at the mines as nearly as may be as of the several and respective days of delivery of the coal at the mines."

We think it clear that after the title passes to the Coal Company at the mines the railroad retains nothing more than an interest in the price, and that this is not the same thing as an interest in the coal. But the Commodities Clause is dealing with an "interest, direct or indirect," in the commodities themselves, and this must mean some kind or degree of ownership or interest in the thing transported, or some power to deal with it or to control it. We think we have already shown that the Railroad Company neither owns nor controls the coal after it has been loaded on cars at the

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breakers. Thereafter the Coal Company is the owner and the master, and fixes prices, routes, and destinations, at its own will. The Railroad Company has parted with its title so completely that it would suffer no loss if thousands of tons should be burnt or otherwise lost in transit. No doubt the railroad will be advantaged whenever the price at tide is high, but the railroad does not increase that price or compel the Coal Company to increase it.

But it seems superfluous to consider the Government's argument further, in view of what was said by the Supreme Court in the Delaware & Hudson case about the meaning of this very phrase—"in which [the railroad] may have any interest, direct or indirect." On page 413 of 213 U. S., on page 538 of 29 Sup. Ct. (53 L. Ed. 836), the court said:

"It remains to determine the nature and character of the interest embraced in the words 'in which it is interested directly or indirectly.' The contention of the Government that the clause forbids a railroad company to transport any commodity manufactured, mined or produced, or owned in whole or in part, etc., by a bona fide corporation in which the transporting carrier holds a stock interest, however small, is based upon the assumption that such prohibition is embraced in the words we are considering. The opposing contention, however, is that interest, direct or indirect, includes only commodities in which a carrier has a legal interest, and therefore does not exclude the right to carry commodities which have been manufactured, mined, produced or owned by a separate and distinct corporation, simply because the transporting carrier may be interested in the producing, etc., corporation as an owner of stock therein. If the words in question are to be taken as embracing only a legal or equitable interest in the commodities to which they refer, they cannot be held to include commodities manufactured, mined, produced or owned, etc., by a distinct corporation merely because of a stock ownership of the carrier. *Pullman Palace Car Co.* v. *Missouri Pac. R. R.*, 115 U. S. 587 [6 Sup. Ct. 194, 29 L. Ed. 499]; *Conley* v. *Mathieson Alkali Works*, 190 U. S. 406 [23 Sup. Ct. 728, 47 L. Ed. 1113]. And that this is well settled also in the law of Pennsylvania is not questioned. It is unnecessary to pursue the subject in more detail, since it is conceded in the argument for the Government that, if the clause embraces only a legal interest in an article or commodity, it cannot be held to include a prohibition against carrying a commodity, simply because it had been manufactured, mined or produced, or is owned, by a corporation in which the carrier is a stockholder."

If we remember that this language was used about a situation arising where a railroad itself owned stock (even in a

controlling amount) in the producing or owning corporation, and where the railroad would [268] therefore profit directly by the price received for the commodity transported, it hardly seems worth while to argue at any length that, where the railroad does not own a single share of such stock, it does not have an "interest, direct or indirect," in the particular commodity thus produced or owned. In such a state of affairs—if we understand correctly what the Supreme Court has said—the interest of the carrier ceases when the commodity is sold and delivered bona fide to a distinct and separate corporation, and no interest remains either direct or indirect, merely because the price has not yet been precisely ascertained.

3. The bill of complaint also makes a formal charge against both defendants under the Anti-Trust act (act July 2, 1890, c. 674, 26 Stat. 209 [U. S. Comp. St. 1901 p. 3200]); but the oral argument left us under the impression that this charge was not much insisted on. We believed then, and have believed since, that, while the Government earnestly desired to obtain a decision concerning the application of the Commodities Clause to the facts of this case, the Anti-Trust branch of the complaint was regarded as comparatively unimportant. For this reason, therefore, we shall not undertake for the present what we think would be the needless task of discussing the evidence bearing upon the charge of restraining or monopolizing commerce. If we are mistaken in this supposition, however, the error can easily be corrected.

A decree may be entered dismissing the bill; but as the situation may change in the future, and the change may afford the Government ground to assert that the affairs of the two corporations have become unlawfully identified, so as to violate the Commodities Clause, the dismissal will be without prejudice to the Government's right to begin a second proceeding whenever it may be so advised.

Syllabus.

UNITED STATES *v.* DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY.*

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY.

No. 517. Argued December 9, 10, 1914.—Decided June 21, 1915.

[238 U. S., 516.]

A railroad corporation engaged at the time of the passage of the Hepburn Act in the business of mining, buying, transporting, and selling coal, in order to divest itself of title after the coal had been mined and before transportation began, caused a coal company to be incorporated having stockholders and officers in common with itself; thereupon the two corporations having a common management entered into a contract prepared by the railroad company under which the railroad company did not go out of the mining and selling business, but when the coal was brought to the surface it lost title by a sale to the coal company f. o. b. the mines and instantly as carrier regained possession and retained it until delivery to the coal company which subsequently paid the contract price; the price paid was a fixed percentage of the price at a fixed terminal on the day of delivery at the mines, and the railroad agreed to sell all of the coal it produced or purchased from others to the coal company, and the latter company agreed to buy only from the railroad company and subject to the contract; the stockholders of the railroad company were allowed to take *pro rata* the stock of the coal company and practically all availed of the option, and the coal company declared a dividend on each share of stock sufficient to pay for [517] the amount of stock allotted to the holder thereof. In a suit brought by the Government alleging that the two corporations were practically one and that the contract was invalid, *held* that: [b]

The Commodity Clause of the Hepburn Act was intended to prevent railroads from occupying the dual and inconsistent position of public carrier and private shipper; and, in order to separate the business of transportation from that of selling, the statute made it unlawful for the carriers to transport in interstate commerce any coal in which the carrier had any interest, direct or indirect.

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* For opinion of the district court (218 Fed., 240), see *ante*, p. 225.

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It is not improper for a carrier engaged in mining coal to institute the organization of a coal company to buy or produce the coal so as to comply with the terms of the Commodities Clause and to give its stockholders an opportunity to subscribe to the stock, but it must dissociate itself from the management of the coal company as soon as the same starts business.

Mere stock ownership by a railroad company or by its stockholders in a producing company is not the test of illegality under the Commodity Clause but unity of management and *bona fides* of the contract between the carrier and the producer.

The Commodity Clause and the Anti-Trust act are not concerned with the interest of the parties, but with the interest of the public; and if a contract between a carrier and a producer is as a matter of law in restraint of trade, or if the producing company is practically the agent of the carrier, the transportation of the article produced by the carrier is unlawful.

The contract in this case enables the railroad company to practically control the output, sales, and price of coal and to dictate to whom it should be sold and as such is illegal under both the Commodities Clause and the Anti-Trust Act.

In order to comply with the Commodities Clause in regard to the transportation of coal, a carrier engaged also in mining coal must absolutely dissociate itself from the coal before the transportation begins, and if it sells at the mouth of the mine, the buyer must be absolutely free to dispose of it and have absolute control; nor should it sell to a corporation managed by the same officers as itself—that is contrary to the policy of the Commodities Clause.

While there might be a *bona fide* and lawful contract between a carrier mining coal and a buying company by which the latter [agreed to] buy all of the coal of the former, the contract to be not illegal must leave the buyer free to extend its business else [518] where as it pleases and to otherwise act in competition with the carrier.

213 Fed. Rep. 240, reversed.

[59 L. Ed. 1488.*]

[CARRIERS—GOVERNMENT CONTROL—ASSOCIATION WITH COMMODITY CARRIED—STOCK OWNERSHIP.—1. The mere ownership by railway shareholders of the stock of a coal company can not be used as a test by which to determine the legality of the interstate transportation of the coal company's coal by the railway company, under the

*The paragraphs following, in brackets, comprise the syllabus of the case as reported in Volume 59, page 1488, Lawyers' Edition, Supreme Court Reports. Syllabus copyrighted, 1914, 1915, by The Lawyers Coöperative Publishing Company.

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act of June 29, 1906 (34 Stat. at L. 584, chap. 3591, Comp. Stat. 1913, § 8563), making it unlawful for any railway company to transport in interstate commerce any article which it may own, or in which it may have any interest, direct or indirect.]

For other cases, see Carriers III, in Digest Sup. Ct. 1908.

[CARRIERS—ASSOCIATION WITH COMMODITY CARRIED—SALE TO CARRIER'S AGENT—MONOPOLISTIC CONTRACT.—2. A contract between a railway company owning anthracite coal mines and a coal company, with practically indentical stock ownership and management, by which the railway company sold the coal at the mouth of the mines to the coal company and instantly regained possession as carrier, retaining such possession until delivery at the conclusion of the interstate transportation to the coal company, which subsequently paid therefor at the contract price, viz, 65 per cent of the New York market price on the day of delivery at the mines, violates both the Commodities Clause of the act of June 29, 1906 (34 Stat. at L. 584, chap. 3591, Comp. Stat. 1913, § 8563), making it unlawful for any railway company to transport in interstate commerce any article which it may own or in which it may have any interest, direct or indirect, and the Sherman Anti-Trust Act of July 2, 1890 (26 Stat. at L. 209, chap. 647, Comp. Stat. 1913, § 8820), prohibiting contracts in restraint of interstate trade, where such coal company was created for the express purpose of becoming a party to such contract, under which it was to handle nothing except the railway company's coal, and was dependent solely upon the railway company for the amount it could procure and sell, and was absolutely excluded from the right to purchase elsewhere without the consent of the railway company (which, however, was under no corresponding obligation to supply any definite amount at any definite date), and was to conduct the selling of the coal so as best to conserve the interests, good will, and markets of the coal mined by the railway company, and was to continue to fill the orders of present responsible customers of the railway company, even if some of such sales might be unprofitable.]

For other cases, see Carriers III; Monopoly II b, in Digest Sup. Ct. 1908.

The appellee was chartered not only as a railroad company, but was authorized to mine and sell coal. The Commodity Clause of the Hepburn Act of 1906 made it unlawful for the carrier to haul its own coal beyond the limits of the State of Pennsylvania, and desiring to continue the business of mining and transporting coal, the railroad adopted a plan under which it was to make a sale and divest itself of title to the coal, at the mouth of the mines, before transpor-

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tation began. Accordingly it caused to be incorporated, under the laws of New Jersey, the Delaware, Lackawanna & Western *Coal* Company, with a capital stock of $6,800,000, divided into shares of $50 each. The Railroad Company then invited its own stockholders to subscribe to the capital stock of the Coal Company at the rate of one share of the latter for each four shares of the former. Ninety-nine per cent of these stockholders did, as was expected, subscribe for the stock of the Coal Company—their subscription being paid for in full out of a cash dividend of $13,600,000 previously declared by the Railroad Company. The new corporation was then organized by electing the vice president of the Railroad Company as president of the Coal Company, and other officers and directors of the Coal Company were also officers and directors of the Railroad Company.

As soon as the organization was completed, the Railroad Company prepared and submitted to the Coal Company a contract by which the Railroad Company, reserving what it needed for its railway locomotives, "agreed to sell and the Coal Company agreed to buy, f. o. b. the mines, all coal which, during the term of the contract, the Railroad Company should produce from its own mines or purchase from any one else." The price for prepared sizes—the more important commercial coal—was fixed at 65 per [519] cent of the price in New York on the day of delivery at the mines. The Railroad Company also leased to the Coal Company all its trestles, docks, and shipping facilities.

The contract—thus prepared by the Railroad Company—was then signed by both corporations and, on August 2, 1909, the Coal Company took possession of the leased property; those who had been agents of the railroad in its sales department became agents of the Coal Company in its sales department and the two corporations, with managing officers in common, also had offices in common in the city of New York.

Thereafter the Railroad Company continued its mining business, annually producing about 7,000,000 tons and purchasing about 1,500,000 tons from operators whose mines

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were located on its railway. After retaining what was needed for use on its railway engines, it sold the balance, aggregating about 7,000,000 tons, to the Coal Company at the contract prices f. o. b. the mines. The coal thus sold by the Railroad Company was then transported by the Railroad Company to destination where it was delivered to the Coal Company, which paid the regular tariff freight rate and the contract prices on the 20th of each month. This course of dealing continued until February, 1913, when the Government filed a petition against both corporations, alleging that the two were practically one and attacking the validity of the contract.

The petition alleged that the coal business was extremely profitable and in order to continue it in all its branches the Railroad Company (which was controlled by a group of 25 persons, owning a majority of its stock), had determined "to cause the organization of a new corporation to be under their own control—whose stockholders would be substantially the same as those of the Railroad Company—and through it to conduct the business theretofore carried on by the railroad sales department, thus securing, in effect, the continued unity of [520] mining, transporting, and selling, in substance, as theretofore and depriving the public of the benefits which the Commodity Clause was intended to produce."

The petition alleged that when the contract was made, in August, 1909, the stockholders of the two corporations were practically identical; that a large majority of the stock in both is still owned by the same persons and that by virtue of the terms and provisions of the contract the railroad had such an *interest* in the coal as to make it unlawful for it to transport such commodity in interstate commerce.

It was further charged that the transportation of the coal sold to the Coal Company was not only a violation of the Commodity Clause, but that the contract tended to create a monopoly and unlawfully to hinder and restrain trade in coal in violation of the provisions of the Anti-Trust Act. In this connection it was also charged that the Railroad Com-

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pany not only mined coal, but purchased the product of other mines located along its railway, and had acquired the output of other collieries on its line, giving to it the disposition of more than 90 per cent of the market, with power to arbitrarily fix prices. The petition averred:

"By reason of the arrangements described, the support of the Railroad Company, and the peculiar advantages and facilities acquired, the Coal Company at once secured and has ever since maintained an unlawful monopoly of the sale of coal produced along defendant's railroad, and has completely dominated the markets at all points thereon not reached by any other railroad. Its position, power, and support render effective competition with it practically impossible, and the monopoly which it now holds will continue indefinitely unless restrained."

Both defendants answered. There was practically no dispute as to the facts, though both corporations contended that the facts alleged and proved did not support [521] the legal conclusions sought to be drawn therefrom by the Government. Each insisted that the two corporations were separate in law and in fact; contended that the Railroad Company had no interest in the coal, and insisted that the Coal Company acted independently of the Railroad Company and was not subject to its control.

At the hearing there was evidence that at the date of the making of the contract all except 2,249 shares in the Coal Company were held by those who held stock in the Railroad Company. By reason of sales of both stocks, it appeared that in October, 1913, 88,116 shares of the railroad stock were held by those who were not then interested in the Coal Company and 6,907 shares of stock in the Coal Company were held by those who were not owners of the railroad stock.

There was also evidence that many of the officers of the Coal Company were not officers of the Railroad Company; that the management of the two corporations was separate and distinct; that the Coal Company kept its own books, deposited its funds in its name in banks of its own choosing, and that the profits went solely to its own stockholders. The Coal Company paid the same rates of freight and demur-

rage as other shippers and received no discriminating favors from the Railroad Company. In 1910 the amount paid to the railroad for the purchase price of coal under the contract was about $20,000,000 and for the freight thereon about $14,000,000. Since the contract was made the Coal Company has bought coal from other persons, the quantity being 3,847 tons in 1909, 2,267 tons in 1910, 6,600 tons in 1911, 92,004 tons in 1912, 310,645 tons in the first ten months in 1913.

There are about 70,000,000 tons of anthracite coal produced annually, of which 20,000,000 tons are sold at tidewater. Of the 7,000,000 tons sold by the Delaware, Lackawanna and Western Railroad Company about [522] 2,000,000 tons are transported to tidewater points, and of this 500,000 tons are prepared sizes. The Coal Company at large expense bought land, built trestles and storage facility at various points in addition to those leased to it by the Railroad Company.

The District Court held that the business of the two corporations had not been so commingled as to make their affairs indistinguishable; that they are two distinct and separate legal beings actually engaged in separate and distinct operations and that the railroad does not own the coal, either in whole or in part, during its carriage but has in good faith dissociated itself therefrom before the beginning of the act of transportation.

In answer to the claim that "the railroad will be the gainer from a high price at tide, since this will necessarily increase the price at the mines and therefore that this interest in the price is such an interest in the coal itself as is condemned by the statute," the court said: "Undoubtedly it is correct to say that the railroad has an interest in the price, but that 'interest' merely means that the railroad will gain by a higher price at tide and does not mean that the railroad has power to control the coal or the price for which it sells." The alleged power to increase the price by increasing the freight was held to be ineffective because freight rates were controlled by the Commerce Commission. "The Railroad Company does not fix prices. It does not decide how much coal is to go to New York Harbor, and it does

not determine the sum for which the coal is to be sold at that point." "The 65 per cent basis had its origin many years ago and affords a convenient basis for calculating the price to be paid for future deliveries." * * * The railroad retains nothing more after the title passes to the Coal Company at the mines than an interest in the price and this is not the same thing as an interest in the coal. The Commodity Clause deals with an in-[523]terest direct or indirect" in the commodities themselves, and this must mean some kind or degree of ownership in the thing transported or some power to deal with it or to control it. The Railroad Company neither owns nor controls the coal after it has been loaded on the cars at the breakers. Thereafter the Coal Company is the owner and the master and fixes prices, routes, and destination at its own will.

The court further said that "the bill of complaint makes a formal charge against both defendants under the Anti-Trust Act, but the oral argument left us under the impression that this charge was not much insisted on. For that reason the Anti-Trust branch of the complaint was regarded as comparatively unimportant, and for that reason we shall not undertake what we think would be the needless task of discussing the evidence bearing upon the charge of restraining or monopolizing commerce. If we are mistaken in this supposition the error can easily be corrected."

The petition was thereupon dismissed without prejudice to the Government's right to begin a second proceeding whenever it may be so advised. 213 Fed Rep. 240. The Government then brought the case here by appeal.

In the Government's brief it is stated that while it did not now ask for a ruling as to the right of the Railroad Company to purchase and sell coal produced in mines along its railroad, it did ask that if the decree was affirmed it should be without prejudice to the right of the United States to institute such proceedings.

Mr. Assistant to the Attorney General Todd and *Mr. Solicitor General Davis* for the United States:

The Railroad Company, whilst continuing to transport in interstate commerce anthracite coal mined and purchased

Argument for Appellees.

by it, has not in good faith dissociated itself [524] therefrom before the transportation, and therefore is continuing to violate the Commodities Clause.

The contract of August 2, 1909, between the Railroad Company and the Coal Company restrains interstate trade and commerce in violation of the Federal Anti-Trust Act.

In support of these contentions, see Att'y Gen'l's Rep., 1912; *Attorney General* v. *Gt. Nor. Ry. Co.*, 29 Law Jour. (N. S. Eq.), 794; *Del., Lack. & West. R. R.* v. *United States*, 231 U. S. 363; *New Haven R. R.* v. *Int. Com. Comm.*, 200 U. S. 361; *Nor. Securities Co.* v. *United States*, 193 U. S. 197; *Standard Oil Co.* v. *United States*, 221 U. S. 1; *Tap Line Cases*, 234 U. S. 1; *United States* v. *American Tobacco Co.*, 221 U. S. 106; *United States* v. *Del. & Hud. Co.*, 164 Fed. Rep. 215; *S. C.*, 213 U. S. 266; *United States* v. *Lehigh Valley R. R.*, 220 U. S. 257; *United States* v. *Union Pacific R. R.*, 226 U. S. 61, and 470. See also 26 Stat. 209, c. 647; 32 Stat. 823, c. 544; 34 Stat. 584, c. 3591; 36 Stat. 854, c. 428.

Mr. William S. Jenney for appellee Railroad Company and *Mr. John G. Johnson* for appellee Coal Company:

The appellees do not maintain a monopoly in the production or sale of coal as alleged in the petition.

The Railroad Company, by a sale of its coal under the terms of the contract in issue to the Coal Company, has in good faith dissociated itself from such coal before transportation.

The contract in issue does not restrain interstate commerce.

In support of these contentions, see Att'y Gen'l's Rep., 1909, p. 57; *Id.*, 1912, p. 23; *Ansbro* v. *United States*, 159 U. S. 695; *Del., Lack & W. R. R.* v. *United States*, 231 U. S. 363; *Paraiso* v. *United States*, 207 U. S. 368; *Rodriguez* v. *Vivoni*, 201 U. S. 371; *Rogers* v. *Ritter*, 12 Wall. 317; *United States* v. *Am. Bell Tel. Co.*, 167 U. S. 224; [525] *United States* v. *Cent. R. R. of N. J.*, 220 U. S. 275; *United*

States v. *Del., Lack & W. R. R.*, 213 Fed. Rep. 240; *United States* v. *Del. & Hudson Co.*, 213 U. S. 366; *United States* v. *Erie R. R.*, 220 U. S. 275; *United States* v. *Lehigh Valley R. R.*, 220 U. S. 257; *United States* v. *Pennsylvania R. R.*, 220 U. S. 275; *United States* v. *Reading Co.*, 226 U. S. 324, and 228 U. S. 158.

Mr. Justice Lamar, after making the foregoing statement of facts, delivered the opinion of the court.

The Commodity Clause of the Hepburn Act was intended to prevent railroads from occupying the dual and inconsistent positions of public carrier and private shipper; and, in order to separate the business of transportation from the business of selling, that statute made it unlawful for railroads to transport in interstate commerce any coal in which the company had "*any interest, direct or indirect.*"[a] *United States* v. *Delaware & Hudson*, 213 U. S. 415; *Delaware &c. R. R.* v. *United States*, 231 U. S. 363, 371.

As will be seen from the statement of facts, the Delaware, Lackawanna and Western Railroad Company was at the time of the passage of the Hepburn Act of 1906, one of the great coal roads engaged in the fourfold business of mining, buying, transporting, and selling coal. As the Commodity Clause made it unlawful to transport its own coal to market, the Railway Company decided to adopt a plan by which to divest itself of title after it had [526] been mined but before transportation began. It thereupon caused a Coal Company to be incorporated having stockholders and officers in common with the Railroad Company. The two corporations, thus having a common management, then made a contract, prepared by the Railroad Company, under which the

[a] "From and after May 1, 1908, it shall be unlawful for any railroad company to transport" [in interstate commerce] "any article or commodity other than timber . . . manufactured, mined, or produced by it, or under its authority, or which it may own in whole, or in part, or in which it may have any interest, direct or indirect, except such articles or commodities as may be necessary and intended for its use in the conduct of its business as a common carrier." 34 Stat. 585.

Railroad Company did not go out of the mining and selling business, but when the coal was brought to the surface the Railroad Company lost title by a sale to the Coal Company f. o. b. the mines and instantly regained possession as carrier. It retained that possession until delivery to the Coal Company, which subsequently paid therefor at the contract price.

The District Court held that it was illegal for the same person to own a majority of the stock in the two corporations and that their contract of sale was lawful.

From the decree, dismissing the bill, the Government appealed to this court where much of the argument was directed to the question as to whether the fact that the two corporations had practically the same shareholders left the Railroad Company in a position where it could lawfully transport coal which it had sold at the mouth of the mine to the Coal Company.

1. But mere stock ownership by a railroad, or by its stockholders, in a producing company cannot be used as a test by which to determine the legality of the transportation of such company's coal by the interstate carrier. For, when the Commodity Clause was under discussion, attention was called to the fact that there were a number of the anthracite roads which at that time owned stock in coal companies. An amendment was then offered which, if adopted, would have made it unlawful for any such road to transport coal belonging to such company. The amendment, however, was voted down; and, in the light of that indication of congressional intent, the Commodity Clause was construed to mean that it was not necessarily [527] unlawful for a railroad company to transport coal belonging to a corporation in which the road held stock. *United States* v. *Delaware & Hudson Co.*, 213 U. S. 414. For a stronger reason, it would not necessarily be illegal for the road to transport coal belonging to a corporation whose stock was held by those who owned the stock of the Railroad Company.

Nevertheless, the Commodity Clause of the Hepburn Act of 1906 rendered unlawful many transactions which prior

to that time had been expressly authorized by the statutes of the States which had chartered the coal roads. And, while the Hepburn Act provided that, in the future, interstate railroads should not occupy the dual position of carrier and shipper, there was, of course, no intent on the part of Congress to confiscate property or to destroy the interest of the stockholders. But, still, upon adoption of the Commodity Clause this appellee railroad was confronted with a difficult situation. To shut down the mines, because the coal could not be transported, would have meant not only a vast monetary loss to the company and its stockholders, but would have been even more harmful to the interests of the public which required a constant supply of fuel. The character of coal property was such as to make it impossible to divide the same in kind among the railroad stockholders, while the value of the coal land was so great as to make it impracticable to find a purchaser in ordinary course of trade. It was, therefore, natural, if not necessary, to organize a corporation with which a contract could be made, and out of cash received or stock issued to pay for or preserve the equity which the railroad shareholders had in the coal.

In this situation there may have been no impropriety in the Railroad Company taking the preliminary steps of organizing such a corporation. Neither was it illegal for the stockholders of the Railroad Company to take stock in the Coal Company, for there are many instances [528] in which the law recognizes that there may be diversity of corporate interest, even when there is an identity of corporate members. A city and the county, in which it is located, may both have the same population but different corporate interests. Many private corporations have both stockholders and officers in common, yet they may, nevertheless, make contracts which will bind both of the separate entities. But whenever two such companies, thus owned or managed, make contracts which affect the interest of minority stockholders, or of third persons, or of the public, the fact of their unity of management must be considered in testing the validity and *bona fides* of the contracts under review.

Opinion of the Court.

2. That principle is to be specially borne in mind in the present case. For this is not an instance of a coal road and a coal company, both of which existed and had made contracts prior to the Commodity Clause; but a case where a coal company was created with the express purpose that, with stockholders in common, it should be a party to a contract intended to enable the Railroad Company to meet the requirements of the Commodity Clause and at the same time continue the business of buying, mining, selling and transporting coal.

It is also to be noted that the Delaware, Lackawanna and Western Railroad Company did not part with title to its coal lands, mines and mining machinery as seems to have been done, on terms not fully stated [*United States* v. *Delaware & Hudson*, 213 U. S. 366, 398 (5), 392], in some of the instances discussed in the Commodity cases. In them the ownership of the mines had passed completely from the railroads to the producing companies and the coal property was no longer subject to the debts of the railroad companies. After such sale of the coal lands there was both a technical and a practical separation of the legal interest of the two corporations in the coal under the ground, on the surface, when it was transported, and [529] when it was sold. The fact that the railroad held stock in the producing company, and received dividends thereon, did not give to the Railroad Company, any more than to any other stockholder in any other corporation, a legal interest in the property of the Coal Company. Nor would the fact that the Railroad Company had once owned it, have made any difference, if—by a normal and *bona fide* sale at the point of production—the carrier had lost all power of control and all right, title, and interest in the coal before the transportation began. *United States* v. *Delaware & Hudson*, 213 U. S. 416, top.

3. But the decisions construing the statute, recognize that one corporation can be an agent for another corporation and that by means of stock ownership one of such companies may be converted into a mere agent or instrumentality of the other. *United States* v. *Lehigh Valley R. R.*,

220 U. S. 257, 273. And, this use of one by the other—or this power of one over the other—does not depend upon control by virtue of the fact that stock therein is held by the Railroad Company or by its shareholders. For dominance of the Coal Company may be secured by a carrier (*New Haven R. R.* v. *Int. Com. Comm.*, 200 U. S. 363) not only by an express contract of agency, but by any contract which in its practical operation gives to the Railroad Company a control or an "interest, direct or indirect" in the coal sold at the mouth of the mines.

Assuming, then, that the incorporation and organization of the Coal Company under the auspices of the Railroad Company was legal; assuming that the election of railroad officers as the first managers of the Coal Company was not illegal; assuming that as officers of the railroad they could contract with themselves as officers of the Coal Company; assuming that at the time of organization it was not unlawful for the Railroad Company and the Coal Company, not only to have officers but offices in common; and finally assuming that all these [530] facts together did not, in and of themselves, establish an identity of corporate interest, still these facts taken together are most significant. They at least prove that the relation between the parties was so friendly that they were not trading at arm's length. And the further fact that one of the parties was under a statutory disability as to hauling coal, makes it necessary to carefully scrutinize their arrangement in order to determine whether it was a *bona fide* and lawful contract of sale, or a means by which the railroad though parting with the legal title retained an interest and control in what had been sold.

4. That contract is published in full in 213 Fed. Rep. 255–259. The provisions material in the present inquiry may be thus summarized:

(*a*) The Railroad Company agreed to sell and the Coal Company agreed to buy all of the coal mined or acquired by the Railroad Company during the continuance of the

contract; (*b*) the price for the more important commercial grades was to be 65 per cent of the New York price on the day of delivery; (*c*) the amount of coal to be sold and delivered was at the absolute option of the Railroad Company as its interests might determine; (*d*) the Coal Company was not to buy coal from any other person or corporation without the written consent of the Railroad Company; (*e*) the Coal Company was to conduct the selling of the coal so as best to conserve the interests, good will, and markets of the coal mined by the Railroad Company; (*f*) the Coal Company was to continue to fill the orders of present responsible customers of the Railroad Company, even if some of such sales might be unprofitable; (*g*) the railroad leased to the Coal Company all of its trestles, docks, and shipping facilities at a rental of 5 per cent of their value; (*h*) the contract could be terminated by either party on giving six months' notice.

[531] The most cursory examination of the contract shows that—while it provides for the sale of coal before transportation begins—it is coupled with onerous and unusual provisions which make it difficult to determine the exact legal character of the agreement. If it amounted to a sales agency the transportation was illegal because the Railroad Company could not haul coal which it was to sell in its own name or through an agent. If the contract was in restraint of trade it was void because in violation of the Sherman Anti-Trust Law. The validity of the contract cannot be determined by consideration of the single fact that it did provide for a sale. It must be considered as a whole and in the light of the fact that the sale at the mine, was but one link in the business of a railroad engaged in buying, mining, selling, and transporting coal.

5. By virtue of the fact that the Railroad Company bought, mined, and sold it—like any other dealer—was interested in maintaining prices, since the contract did not fix a definite sum to be paid for all of the coal sold, but provided that the Railroad Company was to receive 65 per cent of the New York price on the day the coal was

loaded into the cars. The higher the rate in New York the better for the seller. And, by the contract, the railroad reserved a power which, when exercised, could not only curtail production but shipments. Thus, by decreasing the amount transported the supply in New York could be lessened. This would tend to raise New York prices and thus increase the sum the railroad was to receive.

The Railroad Company was in the business of selling, and it is not to be presumed that its power to limit deliveries or to prevent the Coal Company from obtaining coal elsewhere would be often exercised. Yet the power did exist and it was reserved for some purpose—not, as argued, to prevent controversy as to failure to deliver [532] in cases of strikes or accidents, for such is not the language or intent of the contract. Nor is room left for the implication [necessary to the validity of such an exclusive contract, *Chicago, &c., R. R.* v. *Pullman*, 139 U. S. 80 (3), 89, 90], that the seller would deliver reasonable amounts at reasonable times. All such defensive arguments are excluded by the express and emphatic terms of the contract that "the amount of coal to be so delivered and sold to the buyer by the seller shall be at the absolute option of the seller as its interests may determine, and the seller shall be subject to no liability whatsoever for failure to supply the buyer with such amount of coal as it may desire."

It might be said that if such a power was exercised the Coal Company could then go into the market and purchase from other coal dealers. But this contract deprives the buyer even of that ordinary business privilege, declaring that the Coal Company "will purchase all coal to be sold by it from the seller, and will purchase no coal from any other person or corporation, except with the written consent of the seller."

6. Reading these two clauses together, it is evident that the Coal Company was neither an independent buyer nor a free agent. It was to handle nothing except the railroad's coal and was the instrument through which the railroad sold all its product. The Coal Company, though incorporated to do a general coal business, was dependent solely upon the

railroad for the amount it could procure and sell and was absolutely excluded from the right to purchase elsewhere without the consent of the Railroad Company, which, however, was under no corresponding obligation to supply any definite amount at any definite date.

Restrictive contracts should at least be reciprocal and mutual—for if A is bound to purchase only from B the latter should certainly be bound to furnish what A wishes to buy [*Chicago &c. R. R.* v. *Pullman*, 139 U. S. 80 [533] (3), 89, 90]—especially is this true when the subject of the contract is an article in which the public is interested. Even at common law, in passing upon the validity of contracts in restraint of trade, the "public welfare is first considered, and if it be not involved, and the restraint upon one party is not greater than protection to the other party requires, the contract may be sustained." *Gibbs* v. *Baltimore Consolidated Gas Co.*, 130 U. S. 396, 409; *Fowle* v. *Park*, 131 U. S. 97.

In this case the subject of the contract was anthracite coal—an article of public necessity and of limited supply, one-tenth being controlled by the appellee. The Railroad Company might have justly insisted on contract provisions intended to secure payment for all that it produced. But going beyond what was required for its own protection, it restrained the Coal Company from buying from anyone else, and—what is probably more significant in this case—thereby prohibited the Coal Company from competing with the Railroad Company for the purchase of coal mined on the railroad lines. And, this was not a mere perfunctory provision, because the Railroad Company was a buyer of coal and purchased 1,500,000 tons per annum from mines on its system. By this contract it excluded from that market the Coal Company, which, with its capital of $6,000,000, could have been a strong competitor. Such a provision may not have actually effected a monopoly. But considering the financial strength of the carrier; its control of the means of transportation; its powers to fix the time when transportation of the very coal sold was to begin; its power in furnishing cars to favor those from whom it bought or

to whom it sold—such a contract would undoubtedly have that tendency. In that respect it was opposed to that policy of the law which was the underlying reason for the adoption of the Commodity Clause. *New Haven R. R.* v. *Int. Com. Comm.*, 200 U. S. 373.

[534] 7. There is another provision of the contract which shows that the railroad had such an interest in the coal as enabled it to dictate to whom it should be sold, even at unprofitable prices. The agreement provides:

"Sixth. The buyer agrees that it will conduct the business of selling the coal of the seller in such manner as best to conserve the interests of and preserve the good will and markets of the coal mined by the seller, and to continue to fill the orders of all responsible present customers of the seller even though as to some of such customers the sales may be unprofitable, it being understood and agreed that at the prices above quoted the entire business of the buyer will be conducted at a profit."

This is not a mere stipulation that the Coal Company would not injure the reputation of the Railroad Company's coal; while the further provision that the Coal Company would "continue to fill the orders of all responsible present customers, even though some of such sales might be unprofitable," was a further indication of the fact that both parties recognized the railroad had an interest in the coal and used the Coal Company to preserve and secure that interest even after transportation began.

The unusual, onerous, and restrictive terms imposed by this contract may, as between the parties, have been negligible—certainly so long as the stockholders remained the same, since a loss to the Coal Company would be presumably represented by a gain to the Railroad Company. But the Commodity Clause and the Anti-Trust Act are not concerned with the interest of the parties but with the interest of the public and it, therefore, makes no difference whether this contract dictated by the Railroad Company was for the permanent advantage of the Coal Company.

8. It is argued, however, that the contract has not operated to the injury of the parties or of the public.

[585] And, in answer to those urged by the Government, it is said that some of the objections now insisted on were not pressed in the lower court; that there is no complaint that the railroad charged the Coal Company exorbitant prices; or, that it ever raised the New York prices; or, that it failed to make prompt deliveries; or, that it has prevented the Coal Company from buying coal from other operators; or, that the railroad monopolized the coal mined on its railway; or that it deprived such mining companies of an open market. From this it is argued that the present objections to the contract are purely academic. But its validity depends upon its terms. And if, as a matter of law, the contract is in restraint of trade, or if the Coal Company is practically the agent of the Railroad Company, then the transportation of the coal by the latter is unlawful.

9. As already pointed out, the contract has in it elements of a sale and elements of a sales agency. It provides that the Railroad Company will sell and that the Coal Company will buy all coal that is mined during the continuance of the contract; but it prevents the Coal Company from buying from anyone else. It requires it to sell to present railroad customers at the old price, even though those prices may be unprofitable. The seller is not bound to make deliveries of fixed quantities at fixed dates and by decreasing what it will sell and determining when it will ship it has a power in connection with its power as a carrier, which, if exerted, would tend to increase prices in New York. Besides all this, the contract prevents the Coal Company from competing with the Railroad Company in the purchase of coal along the railway line. Taking it as a whole and bearing in mind the policy of the Commodity Clause to dissociate the Railroad Company from the transportation of property in which it is interested and that the Sherman Anti-Trust Act prohibits contracts in restraint of trade, [586] there would seem to be no doubt that this agreement violated both statutes.

10. The Railroad Company, if it continues in the business of mining, must absolutely dissociate itself from the coal before the transportation begins. It cannot retain the title nor

can it sell through an agent. It cannot call that agent a buyer while so hampering and restricting such alleged buyer as to make him a puppet subject to the control of the Railroad Company. If the railroad sells coal at the mouth of the mines to one buyer or to many it must not only part with all interest direct or indirect in the property but also with all control over it or over those to whom the coal is sold at the mines. It must leave the buyer as free as any other buyer who pays for what he has bought. It should not sell to a corporation with officers and offices in common, for the policy of the statute requires that instead of being managed by the same officers, they should studiously and in good faith avoid anything, either in contract or conduct, that remotely savors of joint action, joint interest or the dominance of one company by the other. If the seller wishes—by a lawful and *bona fide* contract, whose provisions as to delivery and otherwise are not in restraint of trade—to sell all of its coal to one buying company, then that one buyer can be bound by reasonable terms and required to pay according to the contract. But such buyer should otherwise be absolutely free to extend its business to buy when, where, and from whom it pleases, and otherwise to act as an independent dealer in active competition with the Railroad Company.

What has been said is sufficient to show that the contract was invalid. That makes it unnecessary to discuss other questions raised but not diposed of by the District Court, and the decision herein is without prejudice to the right of the United States to institute proceedings [537] in reference thereto or to test the right of the Railroad Company to purchase coal for sale.

The decree is reversed with directions to enter a decree enjoining the railroad from further transporting coal sold under the provisions of the contract of August 2, 1909, referred to in the petition.

Reversed.

Mr. Justice McReynolds took no part in the decision of this case.

Statement of the Case.

UNITED STATES v. LEHIGH VALLEY R. CO. ET AL.[a]

(District Court, S. D. New York. December 21, 1914.)

[225 Fed. Rep., 399.]

MONOPOLIES 16—CARRIERS OWNING COAL MINES—REGULATION—INTERSTATE COMMERCE—"DISSOCIATION OF INTEREST."—Where a railroad company has acquired about 18 per cent of contiguous coal mining lands, the acreage of which represents less than 27 per cent of the coal lands naturally tributary to it, and carries about 18 per cent of all the coal transported, of which percentage four-fifths comes from mines controlled by a company in turn controlled by the carrier, but where there is an honest "dissociation of interests" between coal owner and coal carrier, which is merely the lawful conduct of honest men, and where the carrier does not own stock in any company selling coal beyond the limits of the State wherein the composite business of owning, mining, transporting, and selling coal is legal, there is no monopoly of interstate commerce.[b]

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 12; Dec. Dig. 16.]

In Equity. Suit by the United States of America against the Lehigh Valley Railroad Company and others for a violation of the Sherman Act (Act July 2, 1890, c. 647, 26 Stat. 209), and the Commodities Clause of the act of June 29, 1906, c. 3591, 34 Stat. 585 (Comp. St. 1913, § 8563). Bill dismissed.

The Attorney General, represented by *Thurlow M. Gordon*, of Washington, D. C., and *Arthur W. Machen, Jr.*, of Baltimore, Md., for the United States.

John G. Johnson, of Philadelphia, Pa., and *E. H. Boles*, of New York City, for Lehigh Valley R. Co. and others.

Everett Warren, of Scranton, Pa., for Lehigh Valley Coal Sales Co.

John Hampton Barnes, of Philadelphia, Pa., and *Silas W. Howland*, of New York City, for Girard Trust Co.

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[a] The case is pending in the Supreme Court on the appeal of the United States.

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E. V. B. Getty, of New York City, for G. B. Markle Co.

F. W. Wheaton, of Wilkes-Barre, Pa., for Lehigh Valley Coal Co. and Coxe Bros. & Co., Inc.

Hough, District Judge.

This suit is but one chapter in a litigation against anthracite coal owners and carriers, which has now extended over many years and become historic. The earliest chapter requiring notice is the "First Commodities case" (*United States* v. *Delaware & Hudson Co. et al.* [C. C.] 164 Fed. 215, on appeal 213 U. S. 366, 29 Sup. Ct. 527, 53 L. Ed. 836); next came the "Second Commodities case" (*United States* v. *Lehigh Valley Railroad Co.*, 220 U. S. 257, 31 Sup. Ct. 387, 55 L. Ed. 458); and finally the Lackawanna Coal Sales case (*United States* v. *Delaware, Lackawanna & Western Ry.* [D. C.] 213 Fed. 240). At page 249 of 213 Fed. it is said:

"We understand that (a new action against the Lehigh Railroad) has recently been brought in the Second Circuit"—this is the cause referred to.

The District Court is but a parade ground wherein a review of the evidence and arguments may be taken before this action joins the [400] Lackawanna Coal Sales case on the docket of the Supreme Court. Therefore the statement of facts and summary of litigated questions will be largely made merely by reference to the reports above enumerated.

In the Lackawanna case (D. C.), 213 Fed. at 263, it is said:

"The bill of complaint also makes a formal charge * * * under the Anti-Trust Act; * * * but the oral argument left us under the impression that this charge was not much insisted on."

This statement of McPherson, J., marks the only substantial difference that I can discover between this litigation and the one in which he wrote.

The bill herein charges violations both of the "Sherman Act" and the "Commodities Clause," but the extended arguments are addressed almost wholly to the Anti-Trust feature of the litigation. So far, therefore, as the Commodities Clause is concerned, I shall dismiss it with the

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statement that there is no great difference between what the Lackawanna Railway did and was upheld in doing by all the Circuit Judges of the Third Circuit, and what the Lehigh Valley Railroad has been doing as shown in this case.

If there be any material differences, they tend to strengthen the position of the Lehigh as compared with that of the Lackawanna, for the Lackawanna owned outright much, if not most, of the coal long transported over its own lines; whereas, the Lehigh Valley owned the stock of other corporations which under the laws of Pennsylvania had good right to own the lands and mine and sell the coal the transportation of which has given rise to so much litigation. I do not myself think that this difference is substantial. Without further discussion, it is held that nothing in the bill charged constitutes a violation of the "Commodities Clause," if the decision in the Lackawanna Coal Sales case is right—and that I am not concerned to question.

While the tone of complainant's argument on the "Commodities Clause" is well illustrated by an italicized assertion in the brief that "the court (in the Lackawanna case) wholly ignored the most vital provisions in the whole contract," and the decision (of three circuit judges) is merely that "of a court of coördinate jurisdiction and in a different circuit, (and) of course in no way binding upon this court," it is not overlooked that an endeavor has been made to distinguish the Lackawanna suit from this action.

It is asserted that the coal sales company has received and is receiving "discriminating favors from the" other principal defendants. This means that the sales company has an annually diminishing allowance made it by the coal company to encourage the introduction of Lehigh coal in regions where business is presently unprofitable, and has been permitted to buy coal in storage at very low rates, while the railroad company has at inadequate rentals leased to the coal sales company certain "storage plants."

From the assertion that these arrangements are undue favors is drawn the inference that there is a lack of good faith in the creation of the coal sales company which shows that that corporation is but the [401] alter ego of the coal

company, which itself is but the creature of the railroad company; wherefore the law is still infringed.

The suggestion or argument, when examined, amounts to this: That when, by the creation of coal sales companies of which no share of stock belonged to the Lackawanna or Lehigh railroads, those corporations sought to comply with modern law, it was their duty severally to have no relation whatever with the new companies, except to collect freight charges. But the Lehigh Valley Railroad owned certain lands useful only for storing coal, the coal company had certain coal on hand, and the plan of an independent sales company was new. What should or could be done with the lands and coal on hand, and how could the concern retiring from the selling business insure the creation of a strong and pushing successor? Certainly not by hostility. Who would or could buy the coal on hand and occupy and use the storage plants except the coal sales company? But (says complainant) the prices were ridiculously low. Answer is justified that: (1) The assertion is untrue, and (2) it was praiseworthy and lawful at first to sacrifice much in price when the object was to save from further assault the business of selling coal after interstate transportation—a business that had become precarious owing to modern economics as asserted in statutes and interpreted by the courts.

The differences suggested between this and the Lackawanna case seem to me wholly unsubstantial.

Upon the Anti-Trust side of this case no extended discussion of facts is necessary. There is little conflict about facts—in the sense of visible phenomena.

But some analysis of the bill may assist in presenting the theory upon which this suit has been promoted. It is asserted that substantially all of the defendants (except the Girard Trust Company and the G. B. Markle Company)*

* NOTE.—The Girard Trust Company is a defendant solely because it is the trustee of certain bonds which might be injuriously affected by granting the prayers of the bill, and the Markle Company is a party because it long ago made an agreement for a term of years by which the Lehigh Railroad exclusively transports the Markle coal, and the Lehigh Coal Company (and now the coal sales company) became the exclusive selling agent for said coal at prices fixed by Markle

have combined to restrain and monopolize, and have been monopolizing, "the production transportation, and sale in interstate commerce of anthracite coal from lands located along the lines of the Lehigh Valley Railroad."

The method of monopoly and restraint is said to have been by "acquiring control of the output of independent producers by exerting the power of the Lehigh Valley Railroad as a carrier to give undue preference and advantages to the coal producing and trading companies controlled by it and to discriminate against their competitors."

The result of this process is said to be that the "monopoly of the ownership and production of anthracite coal, exercised through subsidiary corporations under its control," has enabled the Lehigh Valley Railroad to prevent "the building of any new railroad in the portion of the anthracite regions served by it, and has kept independent pro- [402] ducers under the disadvantage of having to ship over a railroad *also engaged in the coal business.*"

The italicized portion of the last sentence is most important, for what is meant by "engagement in the coal business?" The bill, the kind of evidence offered, and the arguments in support, all really assume that by "coal business" is meant the operations, united in interest and centralized in control, of mining, shipping, transporting, and selling anthracite coal.

It has already appeared that, if the Lackawanna Coal Sales case is to be followed, it must be held that the Lehigh Valley Railroad has not since the filing of this bill, or for some time before, been engaged at all in the selling of coal to the consumer. It must therefore follow that, when the Government still insists upon the existence of monopoly and restraint of trade, such offensive conduct must be found in an identity of interests between a coal-carrying corporation and coal-owning and mining companies.

But it must also be remembered that the mere fact of such union in interests as manifested by a stock ownership is not unlawful, provided there is a "dissociation in good faith," between "bona fide corporations."

On this point counsel for the government have submitted the proposition that the phrases "dissociation in good faith"

and "bona fide corporations," as used in the opinions of the Supreme Court, do not refer merely or chiefly to the honesty or morality of the transactions, so that when they deny "dissociation in good faith" no reflection is thereby made upon the integrity of those concerned in the transaction.

In other words, a body of men may be honest, moral, well-intentioned, and acting within the letter of the law, and yet be unable to resist conviction of monopoly and restraint of trade because they cannot, in "good faith," "dissociate" the corporations which they control. The proposition is incredible; to my mind "dissociation in good faith" requires no more than the lawful conduct of honest men.

Many hundreds of pages of the testimony herein is summed up in the "First Commodities case" (C. C.) 164 Fed. Rep. at 222. What Gray, J., there stated is still true, and no more detailed reference will be made to the history and development of the Lehigh Valley Railroad and its controlled companies. In order to show monopoly and restraint evidence has been adduced to prove that:

(1) For many years before 1912 the coal mining and selling business of the Lehigh Valley Coal Company was either either absolutely unprofitable or would not have been profitable if that corporation had not been secretly, unduly, and unlawfully favored in the matter of freight rates.

(2) Such favors took the form of the railroad company's furnishing at low rates terminal and storage facilities and making advances of money either without interest or at rates far below what was reasonable under the circumstances.

(3) Producers and shippers of coal from lands neither owned nor controlled by any defendant corporation complained of such dis[403]criminatory treatment and proved before the Interstate Commerce Commission that their grievances were well founded.

(4) The Lehigh Valley Railroad was one of the defendants in *United States* v. *Reading Co.*, 226 U. S. 324, 33 Sup. Ct. 90, 57 L. Ed. 243, and has therefore been conclusively shown as a conspirator striving to prevent the construction of another railroad which might afford an outlet for anthracite in addition to the lines of the defendants in that suit.

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As to all of the above contentions I decline to make any definite finding, because I regard the evidence as immaterial to existing conditions. All of the matters referred to took place before the creation and entry into business of the Lehigh Valley Coal Sales Company, and, assuming all the allegations to be true, it is thought that even in an action under the Sherman Act an opportunity might well be afforded (as in criminal proceedings) for a locus pœnitentiæ.

The following propositions of law I regard as applicable to this case and the enumerated statements of fact as material to the judgment to be pronounced:

(1) Ever since the Lehigh Valley Railroad emerged (more than half a century ago) from the throes of establishing any business at all it has sought to acquire control (mostly through the Lehigh Valley Coal Company) of a considerable portion of that limited region in the State of Pennsylvania, which so far as is known contains substantially all the anthracite coal in the world.

(2) Either by outright purchase, or by acquisition of the stock of (especially) Coxe Bros. & Co., this process had so far succeeded that in the year 1912 (and just before the formation of the Lehigh Valley Coal Sales Company) the Lehigh Valley Coal Company owned or controlled rather less than 13 per cent of the nearly contiguous mining regions in Pennsylvania known as the Wyoming, Lehigh, and Schuylkill. That acreage represented a little less than 27 per cent of the coal lands naturally and conveniently tributary to the lines of the railroad company. Of all anthracite coal transported by all carriers, the Lehigh Railroad was then carrying about 18 per cent, and of that percentage approximately four-fifths came from mines owned or controlled by the Lehigh Valley Coal Company or was produced through such exclusive transportation contracts as had been made with the Markle Company.

(3) The Lehigh Valley Coal Company has from its creation done as it was ordered to do by the Lehigh Valley Railroad, and under such direction has bought, leased, or otherwise acquired control of coal lands. The purpose of this acquisition on the part of the Lehigh Valley Railroad was

to get and firmly keep the business of carrying the coal extracted from those lands.

(4) The Lehigh Valley Railroad Company does not now, and has not since March 1, 1912, owned any shares in any company selling coal beyond the limits of Pennsylvania. It does own, and for many years has owned, all the shares of companies which now own and mine coal and sell it in Pennsylvania f. o. b. pit mouth. The same companies before March 1, 1912, sold the coal so mined in many [404] States of the Union after transportation of the same by the Lehigh Valley Railroad Company.

(5) Since March 1, 1912, the Lehigh Valley Railroad Company has transported no coal (not necessary for its own operation) wherein it had any interest, direct or indirect, within the meaning of existing statutes.

(6) The allegations of the bill of complaint permitted as an amendment by the Second Commodities case were fully denied and have never been proved; but, if they were true prior to March 1, 1912, they are now immaterial.

(7) At the time this bill was filed the regulation of freight rates (including joint rates) for interstate transportation was and still is committed to the Interstate Commerce Commission. No charge of violation of law in respect of rates existing when bill filed or arising since has been proven.

(8) The charge in the bill that freight rates for coal carried were made unreasonably high for the purpose "of injuring independent producers of anthracite," and of forcing them either to sell their mines * * * or enter into contracts for the sale of their output," is not proven; nor is there any such allegation as to existing freight rates or rates existing at the time of bill filed.

(9) The mere creation, maintenance, and extension of the composite business of owning, mining, transporting, and selling coal has long been not only legal but laudable within the State of Pennsylvania, and is so still.*

* Note.—This proposition is rested without further discussion on the statement of Gray, J., in (C. C.) 164 Fed. 224, as quoted in 213 U. S. 402, 29 Sup. Ct. 527, 53 L. Ed. 836. It might have been made after an examination of the testimony in this case.

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(10) Equitable decrees have occasionally been used as epitaphs or means of preventing the resurrection of obnoxious practices (*United States* v. *Trans-Missouri Freight Ass'n*, 166 U. S. 290, 17 Sup. Ct. 540, 41 L. Ed. 1007); but they normally speak in the present tense and are applied to remedy existing evils and not to characterize or condemn past wrongs.

Assuming for argument's sake the correctness of the foregoing, upon what foundation does the complainant's case rest?

The theory is compendiously shown by the following extract from the brief submitted:

"CARRIER ANALOGOUS TO A JUDGE.

"The truth is, where a common carrier, charged with the semi-judicial duty of holding the scales even between various shippers who compete with one another, and of rendering impartial service to all alike, proceeds to buy up the business of some of these competing shippers, the case is as if a judge upon the bench should proceed to buy up the claims of some of the litigants in his court. The one practice restrains trade and fosters monopoly as much as the other would hinder justice and promote corruption."

This delightful argumentum ad judicem shows that what is really complained of is the bald fact that the railroad company, by owning the stock of various coal companies, controls and practically owns so much anthracite coal that it cannot be trusted to deal fairly with the rest of the world in the matter of transportation charges, which matter [405] the judicial branch of our Government is not content to leave to the regulation of another governmental agency, viz, the Interstate Commerce Commission.

It cannot be charged, and is not asserted in argument, that monopoly exists because of the control of so small a portion of anthracite acreage as has been stated above; nor yet in the mere fact of transporting a correspondingly small proportion of all the coal carried by all carriers. So there is found, in the very large proportion which the coal from the Lehigh lands bears to all the coal carried by the Lehigh Railroad, a monopoly within the "territorial unit" consisting of the lands presently reached by the Lehigh Railroad.

This doctrine of territorial unit is a novelty which I do not think bears investigating, for all that it does or can amount

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is this (under existing decisions): The coal lands are lawfully owned; the coal therefrom is lawfully carried; there is an actual and honest dissociation of interests between coal owner and coal carrier. The relations which are complained of have therefore no influence upon interstate commerce, for said relations begin, exist, and end within the limits of the State of Pennsylvania, and are there entirely legal.

The foregoing discussion of the "Anti-Trust" portion of this bill has resulted rather from the vigorous confidence of counsel than from any perception on my part of its difficulty.

If the Lackawanna case is to be followed, and any violation (at or since time when bill filed) of the Commodities Clause denied, there is no life left in this action, unless the meaning of the well-worn phrase "interstate commerce" is to receive fresh enlargement. Complainant's evidence and arguments consist largely in an iteration of alleged wrongs committed in those far-off days when the same entity could mine, transport, and sell its own coal without encountering governmental interference. So great were those wrongs, it is said, that, even though transportation and ownership be now fully divorced in "good faith," their recurrence can only be effectually prevented by finding monopoly and restraint in any ownership by a carrier of potential tonnage—which is undoubtedly the railroad way of regarding unmined coal.

But it is still true that to violate the Sherman Act there must be monopoly or restraint of a particular thing—"interstate commerce." Separated from the Commodities Clause, the same kind of argument would apply to wheat or timber grown on the extensive realty of one of the "land-grant" railroads of the West, and there is at bottom no difference between this argument against the Lehigh Railroad's retention of its coal stocks, and the view humorously condemned by Justice Brewer in an address well worth remembering.[a]

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[a] "The Constitution gives to Congress the exclusive regulation of commerce between the States, as well as between this country and foreign nations; but who can now say, in view of [illegible]

Syllabus.

[406] This case may be thus summed up: No monopoly of interstate commerce is shown nor any attempt to monopolize; for the proof of the pudding is in the eating thereof, and it is impossible to find any of the normal results of monopoly without also finding violations of the Commodities Clause—and none is discovered. As to restraint of interstate trade in coal transported over the Lehigh Road, there can be no restraint without control, and, since the railroad does not control the coal it carries, it has no means of restraint.

Bill dismissed.

UNITED STATES v. READING CO. ET AL.*

(District Court, E. D. Pennsylvania. July 3, 1915. Supplemental Opinion, October 27, 1915.)

[226 Fed. Rep., 229.]

Monopolies 16—Combinations in Violation of Sherman Act—Lease of Coal Roads.—The Lehigh Coal & Navigation Company was the owner of mines and a large acreage of coal lands in the anthracite regions of Pennsylvania, and of a railroad, 180 miles long, with its branches, to which its mines were tributary, and which, extending to the Delaware River, where it connected with other roads, including that of the Central Railroad Company of New Jersey. In 1871 it leased its road for a long term to the Central Company, to receive as rental one-third of the gross earnings of the leased road, afterward modified by fixing a maximum and minimum annual rental. It also agreed to ship all of its coal, with the exception of one-fourth of its production in the Wyoming region, over the lines of the Central Company whenever destined to points

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tion and judicial decision, at what period of time interstate commerce begins and where it ends? If we listen to the contentions of some we shall be led to believe that when the farmer sows his wheat, having in view the gathering in the fall of a crop of grain which he intends to sell to a mill in some other State, the power of Congress attaches as upon a beginning of interstate commerce and continues until the wheat has been manufactured into bread and eaten by the consumer." Address before Virginia State Bar Association August, 1906.

* The case is pending in the Supreme Court on the cross appeals of both parties.

Syllabus.

which could be reached wholly or partly over such lines. Such lease is still in force. *Held*, on the evidence, that it was not intended to and did not operate to create monopoly or to restrain competition, in violation of Sherman Anti-Trust Act July 2, 1890, c. 647, §§ 1, 2, 26 Stat. 209 (Comp. St. 1913, §§ 8820, 8821), either in the production and sale or the transportation of coal, but that, under the circumstances existing at the time it was made, it was a proper business arrangement, advantageous to both parties, by securing to the coal company, whose mines were reached only by the leased lines, a permanent outlet for its coal to the seaboard and elsewhere, which ever since enabled it to compete with other producers, and to the railroad company, a permanent share of the coal of the region for transportation, which it was in danger of losing through combinations and traffic arrangements between other roads.[a]

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 12; Dec. Dig. 16.]

[280] MONOPOLIES 16—COMBINATIONS IN VIOLATION OF SHERMAN ACT—RAILROAD AND COAL COMPANIES.—A combination of a coal-mining company and a railroad company, by whose line the coal of the mining company can be transported from the mines, through the medium of a holding company which owns the stock of both other companies, is not necessarily unlawful as in violation of Sherman Anti-Trust Act July 2, 1890, c. 647, §§ 1, 2, 26 Stat. 209 (Comp St. 1913, §§ 8820, 8821), unless unlawful methods or practices are resorted to which tend to create a monopoly or restrain competition.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 12; Dec. Dig. 16.]

MONOPOLIES 13—COAL-MINING COMPANY—EXTENT OF HOLDINGS AND BUSINESS—"MONOPOLY"—"RESTRAINT OF TRADE."—The facts that a coal-mining company, under the sanction of State laws, has acquired and holds large bodies of coal lands far in excess of its present mining needs, and that it mines and sells a large percentage of all the anthracite coal produced, do not of themselves constitute a monopoly or restraint of trade, in violation of Sherman Anti-Trust Act July 2, 1890, c. 647, §§ 1, 2, 26 Stat. 209 (Comp. St. 1913, §§ 8820, 8821).

[Ed. Note.—For other cases, see Monopolies, Dec. Dig. 13.

For other definitions, see Words and Phrases, First and Second Series, Monopoly; Restraint of Trade.]

MONOPOLIES 20—COMBINATION IN VIOLATION OF SHERMAN ACT—COAL COMPANIES.—The Reading Company, which owned all of the stock of the Philadelphia & Reading Railway Company and of the Philadelphia & Reading Coal & Iron Company, a large producer of

Statement of the Case.

anthracite coal, bought a controlling interest in the Central Railroad Company of New Jersey, which also owned the greater part of the stock of the Lehigh & Wilkes-Barre Coal Company. The two railway companies did not compete in the carriage of coal, because their lines extended into different parts of the mining region and reached different mines; but the two coal companies together mined and sold 20 per cent of the total production of anthracite coal, and the same was sold largely in the same markets. *Held*, that the uniting of such companies in the same ownership created a combination in restraint of interstate trade in violation of Sherman Anti-Trust Act July 2, 1890, c. 647, § 1, 26 Stat. 209 (Comp. St. 1913, § 8820).

[Ed. Note.—For other cases, see Monopolies, Dec. Dig. 20.]

MONOPOLIES 16—INTERSTATE COMMERCE ACT—COMMODITIES CLAUSE—INTEREST OF CARRIER IN COMMODITY TRANSPORTED.—The Philadelphia & Reading Coal & Iron Company was incorporated in 1871 as a subsidiary company by the Philadelphia & Reading Railroad Company to take over and operate coal properties which the railroad company had purchased or desired to purchase. In 1896, when both companies were in the hands of receivers, a reorganization was effected. The property of both companies was sold. Most of the railroad property was conveyed by the purchasers to the Philadelphia & Reading Railway Company, organized for the purpose, while the coal property was reconveyed to the coal and iron company. The capital stock of both these companies was issued to the Reading Company, a holding corporation, which has since continued to own practically all of the same. Since that time, while there has been a common ownership of the two companies and to some extent common directorates, their operating departments and officers have been entirely separate, and the business between them has been conducted at arms' length. The railway company has charged the coal company customary rates for the carriage of its coal without discrimination, and has purchased and paid for all coal for its own use. *Held*, that the railway company did not mine or produce the coal transported for the coal company, nor did it own or have any inter[231]est, direct or indirect, in such coal, which rendered its transportation of the same unlawful under the Commodities Clause of the Interstate-Commerce act as added to Hepburn Act June 29, 1906, c. 3591, § 1, 34 Stat. 585 (Comp. St. 1913, § 8563, cl. 6).

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 12; Dec. Dig. 16.]

In Equity. Suit by the United States against the Reading Company and others. On final hearing. Decree for the United States in part, and in part for the defendants.

Opinion of the Court.

J. C. McReynolds, Atty. Gen., *G. Carroll Todd*, Asst. Atty. Gen., and *Thurlow M. Gordon*, Sp. Asst. Atty. Gen., for the United States.

Robert W. De Forest and *Wm. A. Barkalow*, both of New York City, for defendants Central R. Co. of New Jersey.

Jackson E. Reynolds, of New York City, for defendants Reading Co., Philadelphia & R. R. Co., and Philadelphia & R. Coal & Iron Co.

Henry S. Drinker, jr., *Abraham M. Beitler*, and *John G. Johnson*, all of Philadelphia, Pa., for defendant Lehigh Coal & Navigation Co.

Wm. Jay Turner and *John G. Johnson*, both of Philadelphia, Pa., for defendant Lehigh & N. E. R. Co.

Before BUFFINGTON, HUNT, and MCPHERSON, Circuit Judges.

MCPHERSON, Circuit Judge.

This action was begun in September, 1913, and is the successor of an earlier action brought in 1907, which was decided by this court in 1910 (183 Fed. 427), and by the Supreme Court in 1912 (226 U. S. 324, 33 Sup. Ct. 90, 57 L. Ed. 243). The suit of 1907 was brought against six of the railroads that reach the anthracite coal field of Pennsylvania, with certain coal companies and other defendants. It rested entirely on the Anti-Trust Act of 1890; the Commodities Clause of 1906 was not involved. The result of the suit was to declare two transactions unlawful—a combination through the Temple Iron Company to prevent the construction of a railroad, and a class of contracts known as the "65 per cent contracts"—while the principal complaint of the Government, namely, that the carriers had combined to distribute the coal tonnage among themselves, was not sustained.

But, as a part of the general combination charged to exist among the carriers, the Government had averred that several

minor combinations had been made, and upon the existence and the lawfulness of these the Supreme Court did not pass, declaring that if such combinations had been made, they must be separately attacked, and therefore dismissing the bill as to them, but without prejudice to the Government's right to sue them in detail. The action now before us undertakes to prove the existence of one of these combinations, although the charge made in the suit of 1907 has now been expanded so as to embrace other transactions and other defendants than were embraced by that proceeding. The situation is complicated, and may be difficult to state with clearness. It may perhaps simplify matters if we premise some [282] general statements before taking up the Government's case and the various answers thereto.

The present proceeding in equity declares its object to be: (1) To prevent the defendants "from further restraining and monopolizing, or attempting to monopolize, interstate and foreign trade and commerce, especially in anthracite coal, in violation" of the Anti-Trust Act of 1890; and (2) to prevent some of the defendants "from transporting in interstate or foreign commerce anthracite coal (not intended for their use as common carriers) mined or produced by them, etc., in violation" of the Commodities Clause of the act of 1906.

Confining ourselves for the present to the alleged violation of the act of 1890, we note that the subject matter of the litigation is the interstate and foreign trade in anthracite coal. The coal in question is produced solely from the Pennsylvania deposit, which in the light of our present knowledge seems to be unique. The United States has never owned or controlled it; the present landowners derive their title either from the Penns or from their successor, the Commonwealth of Pennsylvania. What kind of regulation the State might have put in force over this mineral asset, if its value had been realized a century ago, and if the views now current in many quarters about the conservation of natural resources had then prevailed, is purely a matter of academic speculation. What actually happened was this: By gradual degrees anthracite coal came to be recognized as an excellent fuel,

and thereupon the attention of private capital, always in search of profitable undertakings, was attracted thereto. The region was wild and unsettled, and the State desired to see it developed and was willing to offer inducements to that end. As a result, many persons acquired coal lands for small sums under the liberal land laws of Pennsylvania, and various mining and transporting enterprises were promoted, usually under the direct encouragement and authority of State legislation. Obeying an inevitable tendency, the ownership of these lands in the course of years passed into the hands of a comparatively small number of individuals and corporations, so that now, although there are still many smaller owners, the great bulk of the deposit belongs to a few large corporate producers. The agencies of production and transportation have been vastly improved and multiplied, and the use of the fuel has become so widespread that many industries and a very large number of homes are now greatly interested in the way the owners deal with their property.

The general situation from the point of view of the large coal-carrying and coal-producing companies was thus summarized by Judge Gray in the first Reading case, 183 Fed. at page 437:

"As appears from the undisputed testimony of the defendants, these present holdings of coal lands have resulted from acquisitions made through a long period of years by the companies named respectively, or their predecessors in title, beginning, in the case of some of the largest holders and in respect to the larger part of the acquisition, long prior to 1874. The gradual growth of these acquisitions and the consequent development of the present situation, it is contended by the defendants, have been induced by natural causes, such as the geographical and topographical features of the anthracite coal region, which have presented serious obstacles to the construction of railroads with which it was sought to penetrate the different coal fields of [illegible] the anthracite region and which have enhanced enormously the cost of their construction; that in the earlier periods of the development of this region, when the mines and the production of coal were more largely in the hands of individuals and small corporations, the business of mining and marketing coal was wasteful and often resulted largely in the failure or bankruptcy of those concerned therein. The individual exploiter skimmed the cream, so to speak, of his coal lands, and, unable to meet the expenses of practi-

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ing the economies necessary to their full development, the mines were not infrequently abandoned, and of this abandonment, deterioration or ruin was the natural result; that latterly the recurrence of strikes and labor troubles have contributed to the difficulties of the situation; that these strikes and labor troubles extended to all the coal-mining and coal-shipping operations of the whole region, affecting all producers, great and small alike, and that the solidarity of the labor unions compelled a joint agreement, embracing all engaged in mining operations as to the terms of settlement; that since the last settlement, in 1902–03, there has resulted a condition of comparative industrial peace in the anthracite region; that this condition, together with the increased demand for and the consequent increased price of coal have regulated without destroying the natural competition of the great carrying and producing companies; that many economies in the production and sale of coal have been made possible, wasteful production largely done away with, and, more than all, a wise and scientific conservation of the future supply of this necessity of modern life has been brought about, to the infinite advantage of the public and of those connected with the production of coal, whether as capitalists or laborers.

"It is further urged by the defendants that the destruction of present conditions and methods attending the production and sale of coal will produce a deplorable anarchy in the trade, and involve in confusion and financial loss all those engaged therein, a confusion and loss by which the consumer is bound to suffer."

We think the contentions then made fairly state many of the facts, and in the present case we may say of them, as was said by Judge Gray, that while they are not decisive they are pertinent because their importance challenges the court's careful consideration of the question at issue. When we consider that some of the defendants ship coal to almost all the States and to three foreign countries, we obtain some conception of the magnitude of the trade, and the need of caution in dealing with so vast a subject.

The Government is not making any attack on the title by which the defendants hold the lands they own in the Pennsylvania region, nor does it seek directly to divest or disturb their enjoyment thereof. The bill does not complain of the method (in and of itself) by which the title is held, and it does not complain of the methods of producing and distributing the coal, so far as these methods are confined to transportation and sale within the State. Neither is the Government complaining of the mere amount of the defendants'

holdings, or of the mere extent of their business; the act of 1890 has not declared either such amount or such extent to be unlawful, in and of itself; the act is directed simply against unreasonable restraint of interstate and foreign trade, and neither the amount of the defendants' holdings, nor the extent of their business, is relevant to the present inquiry except for the light that may be thrown thereby upon the effect of the defendants' conduct on interstate and foreign trade. In a word, we must keep steadily in view the only legitimate object of the proceeding—namely, to show by evidence that the trade referred to has been unreasonably restrained; and we think the investigation falls [234] naturally into two principal divisions: (1) Whether production has been unreasonably restrained; and (2) whether a similar restraint appears in respect to the sale of the product.

With these preliminary remarks, let us turn to the bill and answers, summarizing them as much as possible, in order to see what questions are presented, and to obtain some idea of their relative importance. Approximations are used throughout, and in the first instance we shall state the facts with special reference to the alleged violations of the act of 1890. There is little dispute over the facts; the controversy is over the proper inferences to be drawn therefrom.

The bill, or petition, charges as follows:

SUBJECT OF THE LITIGATION.

As already stated, the subject is the interstate and foreign trade in anthracite coal from the Pennsylvania field. The larger sizes are extensively used for domestic purposes throughout the New England and Middle Atlantic States, and to a less extent in other sections of the country and in Canada. Small sizes are much used for steam purposes, mainly in the larger cities of the East. In recent years the average annual production has been 75,000,000 tons; in value it is third among the mineral products of the United States. Little anthracite is known to exist, except in northeastern Pennsylvania, where the deposit is by far the largest and most valuable. It is found in several adjoining counties and underlies an area (not always contiguous) of about 310,000

acres, or 484 square miles. At its nearest points, the field is 90 miles from Philadelphia, 140 miles from New York, 250 miles from Pittsburgh, and 265 miles from Lake Erie at the port of Buffalo. In some aspects there are four divisions of the field, but for trade purposes there are only three. From north to south, they are known as the Wyoming region, 176 square miles in area, the Lehigh region, 45 square miles, and the Schuylkill region, 263 square miles. Scranton and Wilkes-Barre are the principal cities in the first; Hazleton, in the second; Pottsville, in the third. Two varieties of anthracite are produced, white ash and red ash, these being further sub-divided; the Wyoming and the Lehigh regions produce the white ash almost wholly, while the Schuylkill region produces both varieties.

In the earliest years of the industry the only transportation was by river or canal. But the railroad soon supplanted these agencies and now carries nearly all the output of the mines to market. Ten railroads enter the field, namely:

(1) The Reading Railroad, which runs from the Schuylkill and the Lehigh regions to Philadelphia, and thence through New Jersey to Port Reading on New York Harbor.

(2) The Central Railroad, which runs from the Wyoming and the Lehigh regions, through Pennsylvania and New Jersey, to Port Johnston, Elizabethport, and Jersey City, all on New York Harbor.

(3) The New England Railroad, which runs from the Lehigh region to Campbell Hall, N. Y., connecting there with the systems of the New York Central and of the New York, New Haven & Hartford.

[235] (These three railroads are parties defendant; the remaining seven are not.)

(4) The Lehigh Valley Railroad, which runs from all the regions to Perth Amboy and Jersey City, both on New York Harbor, and also to Lake Erie.

(5) The Pennsylvania Railroad, which also reaches all the regions.

(6) The Delaware, Lackawanna & Western Railroad, which runs from the Wyoming region to Hoboken, on New York Harbor, and also to Buffalo.

(7) The Erie Railroad, which runs from the Wyoming region to Weehawken, on New York Harbor, and also to Buffalo.

(8) The New York, Susquehanna & Western Railroad, which runs from the Wyoming region to Edgewater, on New York Harbor.

(9) The New York, Ontario & Western Railroad, which runs from the Wyoming region to tidewater at Cornwall, on the Hudson River, and at Weehawken, on New York Harbor, and also to Oswego, on Lake Ontario.

(10) The Delaware & Hudson Railroad, which runs from the Wyoming region in a northerly direction.

It will thus be seen that eight railroads reach the Wyoming region, five reach the Lehigh region, and three reach the Schuylkill. All of these eight railroads have been operating in the field since 1870 at least; of the other two, one entered it directly in 1882 and directly in 1894, and the other entered in 1890.

Two lines of canals also are still in existence and do some business.

(1) The Schuylkill Canal, which follows the Schuylkill River from Port Clinton to Philadelphia, and is owned and operated by the Schuylkill Navigation Company.

(2) The Lehigh Canal and its continuation, the Delaware Division Canal, which follow the Lehigh and the Delaware Rivers from Coalport (or Mauch Chunk) to Easton and thence to Bristol. These canals are operated by one of the defendants, the Lehigh Navigation Company.

All the railroads mentioned, except the New England and the Delaware & Hudson, reach New York Harbor, and that point receives about 25 per cent of the total tonnage shipped from the mines. The freight rate is substantially the same over each road. New York Harbor is the largest market and point of distribution, all the coal terminals being on its western shore in New Jersey. Running from north to south, they are as follows:

At Edgewater, the terminal of the New York, Susquehanna & Western.

At Hoboken, of the Delaware, Lackawanna & Western.

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At Weehawken, of the Erie, and also of the New York, Ontario & Western.

At Elizabethport and at Port Johnston, of the Central Railroad.

At Port Reading, of the Reading Railway.

At Perth Amboy, of the Lehigh Valley.

At South Amboy, of the Pennsylvania.

At these terminals, the coal is screened, weighed, dumped into barges, and sold free on board. From the three upper terminals the freight [236] charge to a dock in New York is about 15 cents a ton. From the remaining and more distant terminals it is 5 cents more, but the selling price at the terminals is 5 cents a ton less, so that the price in New York City is the same, whether the coal comes from one terminal or another. Some of the coal shipped to New York Harbor is not transferred to barges, but remains in the cars, these being towed on car floats to or toward points of destination.

After New York Harbor, Philadelphia is the most important market. It is served by the Reading Railway and by the Pennsylvania Railroad, and is a point from which a large quantity of coal is distributed by water, most of it going to New England.

Of the total production of anthracite, about 12 per cent is consumed locally; of the remaining 88 per cent about one-fifth finds a market in Pennsylvania, and four-fifths elsewhere.

Taking the latest figures that are available—for 1905—the shipments from the mines were distributed to the following points:

	Tons.	Per cent.
Pennsylvania	11,520,382	18.76
New York	18,125,419	29.52
New Jersey	7,212,341	11.74
New England States	8,692,504	14.15
Southern States	2,030,088	3.30
Western States	6,904,314	11.24
Pacific coast	1,748	.003
Canada	2,187,450	3.56
Other foreign countries	42,533	.07
Supply coal to railroads	4,643,426	7.56
Total	61,410,201	100.00

These proportions are probably still maintained, although the annual production has been increased by 10,000,000 tons or more.

GENERAL DESCRIPTION OF DEFENDANTS.

The Reading Company—called herein the Holding Company—is a Pennsylvania corporation created in 1871, with extensive powers that need not be enumerated. Its general office is in Philadelphia, and its present name was adopted in 1896. In November and December of that year its capital stock of $100,000 was increased to $140,000,000, divided into three classes, and all the stock has been issued. Its funded debt is $130,000,000.

The Philadelphia & Reading *Railway* Company—called the Reading Railway—is the successor of the Philadelphia & Reading *Railroad* Company. It is a Pennsylvania corporation created in November, 1896, with a capital stock of $20,000,000, afterwards increased to $42,500,000, and a funded debt that is now $50,000,000. Since December 1, 1896, it has been operating a system of railroads that extends southeasterly from the Schuylkill region of the coal field, through Reading, to Philadelphia, Port Richmond, and Wilmington, all on the Delaware River. From Philadelphia its line runs northeasterly, through Bound Brook, to Port Reading, on New York Harbor. It is also operating barges and other vessels from Port Richmond to the principal [237] ports of New England from Long Island Sound to Maine, and it operates similar vessels from Port Richmond to the general neighborhood of New York. Since 1896 and 1900 it has connected at Philadelphia and at Wilmington with the Baltimore & Ohio Railroad, thus forming a through route from the anthracite field to Baltimore and Washington. Since 1896 it has connected at Newberry Junction, Pa., with the New York Central Railroad, thus forming a through route to points on the latter road between Lake Erie and the Hudson River and between Albany and Boston. At Rotterdam Junction, N. Y., it connects with the Boston & Maine Railroad, which reaches points in central and northern New England. To the points thus

reached by its own lines, or by these connections, it carries large quantities of general merchandise and of coal, both bituminous and anthracite.

The Philadelphia & Reading Coal & Iron Company—called the Coal & Iron Company—is a Pennsylvania corporation, created in 1871. Its present capital stock is $8,000,000, and its debt is more than $74,500,000. Both before and since 1901 it has owned or leased about 98,500 acres of coal-bearing lands in the Schuylkill region, containing many million tons of coal, and has shipped the coal taken from these lands and the coal bought from other producers to many eastern, southern, and western markets.

The Central Railroad Company of New Jersey—called the Central Railroad—is a New Jersey corporation created in 1847. Its present capital stock is $27,500,000, and its funded debt $48,000,000. Since before 1901 it has operated as owner or lessee a railroad system that extends from the Wyoming and the Lehigh regions easterly across Pennsylvania and New Jersey (via Phillipsburg opposite Easton on the Delaware River) to Port Johnston, Elizabethport, and Jersey City—three points on New York Harbor—and extends also from Newark, N. J., southerly to Delaware Bay. It has extensive power to build and operate branches. Since before 1901 it has also been operating barges and other vessels from Port Johnston and Elizabethport to New York City and to ports on Long Island Sound and in New England; and it also operates car floats from Jersey City to New York City and to other points not far away. Before and since the same year its system has had the following connections:

(1) At Phillipsburg it connects with the Pennsylvania Railroad system, thus forming a through route from the anthracite field to Philadelphia, Wilmington, Baltimore, and Washington.

(2) At Easton it connects with the Lehigh & Hudson River Railway, this road in turn connecting at Maybrook, N. Y., with the system of the New York, New Haven & Hartford Railroad, thus forming a through route from the anthracite field to points in central and southern New England.

(3) Near Slatington, on the Lehigh River, and at Northampton and at Bethlehem Junction, it connects with the Lehigh & New England Railroad, this road in turn connecting at Campbell Hall, N. Y., with the system of the New York, New Haven & Hartford Railroad, thus forming another through route from the anthracite field to points in central and southern New England.

[238] (4) At Sterling Junction, and at Weehawken, it connects with the West Shore Division of the New York Central Railroad—the West Shore in turn connecting at West Albany with the Boston & Albany Division of the New York Central, and connecting also at Rotterdam Junction with the Boston & Maine Railroad—thus forming through routes from the anthracite field to points along the Hudson River and between Albany and Boston, and to Boston and Portland and other points in central and northern New England.

(5) At Sixtieth street, New York City, via car floats from Jersey City, it connects with the main division of the New York Central, forming a through route from the anthracite field to points on that system along the Hudson and elsewhere.

Over these routes it has carried much traffic of all kinds, including anthracite in large quantities, to New York Harbor, Long Island Sound, and New England, from Long Island Sound to Maine, and also to many other points reached either by its own lines or by the lines of the connecting carriers already named.

The Lehigh & Wilkes-Barre Coal Company—called the Wilkes-Barre Coal Company—is a Pennsylvania corporation created in 1874 by the merger of two other companies. Its present capital stock is more than $9,000,000, and its funded debt is nearly $17,000,000. Since prior to 1901 it has owned or leased nearly 16,000 acres of coal-bearing lands—13,500 acres being in the Wyoming region, and the rest in the Schuylkill region. These lands contain many million tons of anthracite. It has mined for many years, buying also from other producers, and has shipped and sold the coal chiefly, but not wholly, in the Eastern markets from New York to

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Maine, reaching Philadelphia also and some points farther south.

The Lehigh Coal & Navigation Company—called the Lehigh Navigation Company—is a Pennsylvania corporation created in 1822, originally to hold lands, and to build a canal and slack-water navigation along the Lehigh River. Afterwards it was authorized to build certain lines of railroad. Its capital stock is more than $26,000,000, and its funded debt is more than $21,000,000. It built and still owns and operates the Lehigh Canal, which runs for 46 miles along the Lehigh River from Coalport (or Mauch Chunk) to Easton; and it leases the Delaware Division Canal, which connects with the Lehigh Canal and runs for 60 miles along the Delaware River from Easton to tidewater, at Bristol, 18 miles above Philadelphia. These two canals thus form a continuous line from the anthracite field to tidewater, and the Lehigh Navigation Company has operated them for many years as a common carrier, anthracite being the principal freight. Its railroad is the Lehigh & Susquehanna Railroad, about 180 miles long with tributaries and branches, which runs from Phillipsburg northwesterly through Pennsylvania, touching the Schuylkill and the Lehigh regions and penetrating the Wyoming region as far as Wilkes-Barre and Scranton. It has long controlled by ownership or otherwise more than 13,000 acres of coal-bearing lands in the Lehigh region, containing many million tons, the annual production being nearly 4,000,000 tons. Its coal is shipped mainly to eastern markets, including New York City [289] and its neighborhood, points in New England from Long Island Sound to Maine, and points from Philadelphia to Washington. It formerly owned also more than 5,000 acres of coal-bearing lands in the Wyoming region, these being acquired after the construction of the Lehigh & Susquehanna Railroad. It owns and operates (until recently) a gathering line, the Panther Creek Railroad, which collects the product of its mines and connects at Hauto with the lines of the Central Railroad, and connects also at Tamaqua with the lines of the Reading Railway and of the Lehigh & New England Railroad. Almost all the Navigation Com-

pany's coal reaches market by these two connections at Haute and at Tamaqua.

The Wilmington & Northern Railroad Company is a Pennsylvania-Delaware corporation created in 1877. Its present capital stock is $1,500,000, and its funded debt is $894,000. Its railroad, 72 miles long, runs from Wilmington, through Coatesville, to a point near Reading, reaching that city over the rails of the Reading Railway. At Reading, it connects with the Pennsylvania Railroad and the Reading Railway, thus forming two through routes from the anthracite field to tidewater at Wilmington. Until February 1, 1900, it operated the line from Reading to Wilmington, carrying anthracite as its principal freight.

The Lehigh & Hudson River Railway Company—called the Hudson River Railway—is a New York-New Jersey corporation created in 1882. Its present capital stock is $1,340,000, and its funded debt is $3,230,000. Since before 1901 it has operated a railroad from Easton to Maybrook, N. Y. At Easton it connects with the Central Railroad, the Lehigh Valley Railroad, and the Delaware, Lackawanna & Western Railroad (the last two companies not being parties to this action). From Easton it runs through Belvidere (where it makes another connection with the Lackawanna road) to Maybrook, where it connects with the system of the New York, New Haven & Hartford, thus forming a through route from the anthracite field to points in central and southern New England. It also reaches Campbell Hall, N. Y., where it connects with the New York Central system, thus forming a through route from the coal field to points on that system. About 20 per cent of its tonnage is anthracite.

The Lehigh & New England Railroad Company—called the New England Railroad—is a Pennsylvania-New Jersey corporation. Its present capital stock is $1,000,000, and its funded debt is $8,000,000. Its road runs from several points in Pennsylvania to Campbell Hall. In Pennsylvania, it connects at Tamaqua, in the Schuylkill region, with the Reading Railway, and with the Panther Creek Railroad of the Lehigh Navigation Company; at Slatington, with the

Lehigh Valley Railroad; and at a point opposite Slatington, and also at Northampton, and at Bethlehem Junction, with the Central Railroad. At Campbell Hall, it connects with the systems of the New York Central, and of the New York, New Haven & Hartford, thus forming a through route to points in New York and in central and southern New England. About 16 per cent of its tonnage is anthracite.

The individual defendants have been made parties to the bill in [240] their character as officers or directors of some of the corporations defendant.

CHARGES AGAINST DEFENDANTS.

The charges against the defendants must be much condensed. The transactions attacked are divided into three classes: The first, comprising acts and agreements before 1896; the second, those from 1896 to 1901; and the third, those from 1901 onward. This is the general division, although occasional overlapping may take place.

BEFORE 1896.

1. *Transactions of the Reading Railroad with the Coal & Iron Company.*—The Reading *Railway* was not chartered until the latter part of 1896. Before that time, its main line and branches (with some exceptions) were operated by the old Reading *Railroad*, a Pennsylvania corporation created in 1833. About 1871 the Railroad Company undertook to control in some measure the production of anthracite along its lines. It announced the policy in that year, stating its reasons to be the serious interruption of its business by strikes and the alternate periods of expansion and depression in the trade, and stating also that the policy could probably be best carried out without injuring individual interests if the Railroad became the owner of coal lands along its branches. Accordingly, it had already bought 70,000 acres, and had borrowed and spent for this purpose $12,000,000. But the Railroad's charter restricted it to the business of a common carrier, and therefore the Coal & Iron Company, incorporated in the same year, took

over the lands already purchased. The whole capital stock of the Coal & Iron Company was owned by the Railroad. Within a short time the Coal & Iron Company began to mine and sell coal, shipping to market over the Railroad. Assuming the original motive to be as stated, the Government contends that the Railroad soon expanded its policy, intending to control, not merely enough lands to secure a fair share of tonnage, but enough to control production in the Schuylkill region and to monopolize transportation therefrom. In support of this contention, the bill cites the report of an investigating committee appointed in 1885 by the Railroad's stockholders, in which the original policy is declared to have grown into a policy to prevent competition and to secure control, in evidence whereof the committee refers to the acquisition of 20,000 additional acres in 1874. Citation is also made from the Railroad's report for 1881, which states the object of the policy to be the control of the entire production in that region, as well as the control of iron production in the Schuylkill Valley.

Pursuing this policy (the bill goes on), the Railroad furnished money and credit in large amounts to the Coal & Iron Company, wherewith the latter acquired shipping and marketing facilities, additional coal lands, and the shares of other coal-owning and coal-mining companies. But this policy of buying a large acreage was costly and injudicious, much of the land remained undeveloped and unproductive, and serious loss often resulted—the aggregate thereof [241] being several million dollars, which was paid by the Railroad directly or indirectly. By September, 1896, the Railroad had advanced more than $65,000,000, none of which had been repaid. Moreover, the Railroad had guaranteed $12,000,000 of the Coal & Iron Company's bonds, on which it often paid $1,000,000 a year for interest and sinking-fund charges. The Railroad received no interest on any of its advances. Further, the Railroad remitted several million dollars of freight charges against the Coal & Iron Company. By these financial favors—namely, the advance of money and credit without interest, the payment of losses and of interest on the Coal & Iron Company's bonds, and the re-

mission of freight charges—the Railroad unlawfully discriminated against other producers and shippers, and thus was able to advance toward complete control. The extent of its progress in that direction is indicated by the following facts: By September, 1896, the Coal & Iron Company had acquired about 169,000 acres of land in the Schuylkill region, more than 98,000 containing coal, and also controlled the capital stock of six other corporations that owned more than 11,000 acres in the same region, 9,000 containing coal. These lands, it is said, contain more than half the coal in the Schuylkill region, and nearly half the whole deposit. On these lands there were 65 collieries, most of which were operated by the Coal & Iron Company, the production in 1896 being more than 7,000,000 tons. As the Coal & Iron Company also bought coal at the mines from other producers, its total shipments in 1896 over the Railroad were more than 8,000,000 tons. This was about 80 per cent of all the anthracite carried by the Railroad.

These transactions by the two companies are attacked as outside the normal course of business development, and as having both the object and the effect of giving the Railroad control of production in the Schuylkill region, and control of carriage and of sale to and in markets beyond the State. Therefore the Railroad's control of the Coal & Iron Company by stock ownership is charged to have been an unlawful combination and monopoly.

But the Government expressly declares that it does not attack the Coal & Iron Company, in and of itself, as an unlawful combination or monopoly.

2. *Leasing of the Schuylkill and the Susquehanna Canals by the Reading Railroad.*—The Schuylkill Navigation Company (not a defendant) owns a canal and slack-water navigation along the Schuylkill River from Port Carbon to Philadelphia, and since before 1870 this canal has been a water route from the coal field to tidewater. In 1869 it carried more than 1,000,000 tons of freight, most of it anthracite; and it was then, and for many years had been, competing actively with the old Reading Railroad in the carriage of coal from the mines to Philadelphia and to intermediate points. In

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July, 1870, in order to suppress such competition and to monopolize the carriage of anthracite from the Schuylkill region, the Railroad leased the canal for 999 years at an annual rental of $655,000. Afterwards it acquired nearly all the Navigation Company's capital stock and debt, $4,000,000 [242] and $8,500,000, respectively. Being thus in control, it diverted traffic from the canal to its own road, so that in 1880 the canal's tonnage was less than 700,000 tons, in 1890 it was less than 150,000 tons, and since that year it has diminished still further. In 1888 the rental was reduced to a nominal sum; before that time the Railroad's loss in operating the canal had been $150,000 a year, this being the price of suppressing competition. The Railroad's lease and other interest continued until September, 1896, when all its property was sold at receivers' sale. The Railroad's control of the Schuylkill Canal is charged to have restrained and monopolized trade unlawfully because the canal's competition was thus suppressed.

We need not refer to the Susquehanna Canal—which runs from Columbia, Pa., to Chesapeake Bay—because the Government seems to lay no weight on the subject.

3. *Temporary leasing of the Lehigh Valley and the Central Railroads by the Reading Railroad.*—The bill goes on to charge that the old Reading Railroad, being thus dominant in producing and transporting coal from the Schuylkill region, undertook to enter the Lehigh and Wyoming regions also. Accordingly in 1892 it leased for 999 years the lines of the Lehigh Valley Railroad Company, which entered all the regions and extended to New York Harbor and westwardly to Buffalo. It did not act directly in leasing the Central Railroad, but used the agency of the Port Reading Railroad Company, whose entire capital stock it owned. Accordingly the Port Reading Company leased for 999 years the lines of the Central Railroad, which entered the Wyoming region and touched the Lehigh and the Schuylkill regions and had three New York terminals. At the same time the Coal & Iron Company—whose stock also was owned entirely by the Reading Railroad—contracted to purchase at the mines the whole output of the Lehigh

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Valley Coal Company, a large owner and producer in all three regions, whose capital stock was owned by the Lehigh Valley Railroad Company. And the Coal & Iron Company made a similar contract with the Wilkes-Barre Coal Company, a large owner and producer in the Wyoming region, whose capital stock was nearly all owned by the Central Railroad. By these arrangements it is charged that the Reading Railroad would have controlled about 75 per cent of the total deposit of anthracite, and the transportation of about 50 per cent of the annual output.

Except in their bearing upon the question of the old Reading Railroad's purpose and object, these leases and contracts are no longer important; the agreements with the Central Railroad and with the Wilkes-Barre Coal Company were set aside by the New Jersey Court of Chancery, and the Lehigh Valley contracts were thereupon rescinded.

CHARGES IN 1896.

In 1893 the old Reading Railroad and the Coal & Iron Company went for the third time into the hands of receivers, and on September 23, 1896, all the properties of both companies were sold at judicial sale in accordance with a plan of reorganization of which J. P. Morgan [243] & Co. were the managers. In November, the Reading *Railway* was organized and took title to the railroad properties (except the equipment) formerly belonging to the old Reading *Railroad*, paying for the same by delivering certificates of stock representing its whole capital of $20,000,000, and by executing a purchase-money bond and mortgage, also for $20,000,000. The railway took possession on December 1, and since then has continuously operated these roads.

In November the purchasers at the sale reconveyed to the Coal & Iron Company its former property, including lands, mines, and shares of other companies. In consideration whereof it joined the holding company as co-obligor in a general mortgage for $135,000,000. On December 1 it took possession of the reconveyed property, and has since been engaged in mining, selling, and shipping coal.

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Among the securities acquired from the old Reading *Railroad* at the receivers' sale was the whole capital stock of the Reading Company, a Pennsylvania corporation that had been created under another name in 1871, with power inter alia to buy and sell the shares and bonds of other corporations. This company had maintained its corporate existence, but had done little active business. But, as it antedated the Pennsylvania Constitution of 1874—which forbade a common carrier to mine coal for transportation over its line—it was believed to be a suitable agency to effect the practical and substantial combination of the Coal & Iron Co. and the Reading Railway in spite of the constitutional provision. Accordingly, its capital stock was increased to $140,000,000 and its name was changed to the Reading Company—called the Holding Company in this opinion.

On December 23 the Holding Company took title to the whole capital stock of the Railway Company and of the Coal & Iron Company, $20,000,000 and $8,000,000, respectively; to the purchase-money mortgage debt of the Railway Company, $20,000,000 in a single bond; and to all other property sold at the judicial sale that had not already been conveyed to the Reading Railway, or to the Coal & Iron Company. The Holding Company thus acquired the equipment (railroad and marine) of the old Reading Railroad; the claim of that railroad against the Coal & Iron Company for advances and freight, amounting to more than $68,000,000; and the capital stock and debt of the Schuylkill Navigation Company. In consideration of this transfer, the Holding Company delivered certificates for its $140,000,000 of capital stock (except $50,000 thereof), and on January 5, 1897, gave a general mortgage, with the Coal & Iron Company as joint obligor, which covered substantially all the property of both companies, to secure $135,000,000 of bonds. Of these about $50,000,000 were presently delivered, and the remainder was reserved. The stocks and bonds thus delivered by the Holding Company were thereupon distributed among the persons entitled thereto under the plan of reorganization. Thus the Holding Company became the owner of all the equipment formerly owned and used by the old Reading Railroad.

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The same person became president of the Holding Company, of the Reading Railway, and of the Coal & Iron Company, and the same person became treasurer of each. The directors of the Holding Com[244]pany furnished a majority in the boards of the Reading Railway and of the Coal & Iron Company, and as a rule the majority in each of these two boards was composed of the same individuals.

Of the bonds secured by the general mortgage of $135,000,000—which binds both the Holding Company and the Coal & Iron Company—nearly $51,000,000 were reserved (and are being used) to take care of bonds of the old *Railroad* that are secured by mortgage on property now owned by the Reading *Railway;* $14,000,000 were reserved to take care of bonds of the Coal & Iron Company; and $20,000,000 were reserved and have been used for the benefit of the Reading Railway's roads.

The general mortgage referred to makes both obligors liable for the interest on the outstanding bonds of the old Railroad, and on the similar bonds of the Coal & Iron Company. The Reading Railway cannot raise capital for new construction or improvements by a public sale of the bonds that were reserved for that purpose by a certain prior mortgage dated November 18, 1896, but is obliged to deliver such bonds to the Holding Company with an equal amount of its capital stock. Thereupon the Holding Company is to deposit the securities under the general mortgage of January 5, 1897 and issue an equal amount of its own bonds, paying over the proceeds of these to the Railway.

Before the Holding Company can declare or pay a dividend, it must deliver to the trustee under the general mortgage a statement showing the output of anthracite during the year preceding from the lands owned by the Coal & Iron Company, and must pay to the trustee 5 cents per ton on such output, if the dividend equal or exceed such sum, or such smaller amount as may equal the dividend so declared. The Holding Company still owns the whole capital stock of the Reading Railway and of the Coal & Iron Company, and has always directed the votes thereon. The three Reading Companies have continued to have in common the same presi-

dent, treasurer, and certain other officers. The general offices of each company are in the same building, and their annual reports are published in the same pamphlet. From 1906 to 1911 the Reading Railway paid an annual dividend of 30 per cent. In 1911 its capital stock was more than doubled and its rate of dividend reduced to 15 per cent. These dividends, with other payments made by it, constitute nearly 80 per cent of the Holding Company's income. The Coal & Iron Company has never paid a dividend. Since 1898 the new equipment of the Reading Railway has cost $30,000,000, and of this amount the Holding Company has contributed $24,000,000.

Thus it is alleged that the Holding Company, the Reading Railway and the Coal & Iron Company, are one and the same association of persons, engaged in mining, selling, and transporting, anthracite coal under the direction of the individuals named as defendants. And the Holding Company, by acquiring the capital stock of the Reading Railway and of the Coal & Iron Company, has become the successor of the old Reading Railroad in the policy, referred to above, of monopolizing production and transportation in the Schuylkill region. [245] Therefore the Holding Company's stock control of the Reading Railway and of the Coal & Iron Company is an unlawful combination and monopoly, in violation of the act of 1890. And a similar charge is made against the Holding Company's stock control of the Reading Railway and of the Schuylkill Navigation Company. (A violation of the Commodities Clause is also charged, but this will be considered separately.)

CHARGES FROM 1896 TO 1901.

1. *Advances to the Coal & Iron Company.*—As already stated, the Holding Company became the owner in 1896 of the old Railroad's claim against the Coal & Iron Company for advances and for unpaid freight, amounting to about $68,000,000. Thereafter from time to time the Holding Company advanced $12,000,000 more to the Coal & Iron Company for like purposes, this debt being carried on the books of both companies merely as an open account. Inter-

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est thereon is not treated as a fixed charge of the Coal & Iron Company; none was paid prior to 1900, and since then never at a higher rate than 2 per cent; the rate in 1911 being one-half of 1 per cent. Further, although the Coal & Iron Company is jointly liable with the Holding Company for the interest on the bonds outstanding—now about $99,000,000—secured by the general mortgage of January, 1897, the Holding Company has always paid the whole of such interest and has made no charge against the Coal & Iron Company on account thereof.

It is therefore alleged that, as the Holding Company and the Reading Railway are united in ownership and management, the advances and accommodations extended by the Holding Company to the Coal & Iron Company are to be attributed to the Reading Railway itself, and are unlawful discriminations against other shippers; the reason being that such advances and accommodations increase the power of the Coal & Iron Company over these competitors, and thus promote and secure the monopoly that the Holding Company has acquired (through the agency of the Coal & Iron Company) in the ownership, production, and sale of anthracite coal.

2. *Wilmington & Northern Railroad.*—Before 1898 the Wilmington & Northern Railroad Company was operating a line from Wilmington, at the head of Delaware Bay, to Reading, and especially was carrying anthracite coal in competition with the Reading Railway, whose line ran from Reading to Philadelphia, and thence to Chester, where it connected with the Baltimore & Ohio Railroad and thus reached Wilmington. It is charged that these two roads were then, and are now, "potentially" competitive routes of transportation from the anthracite field to tidewater at the head of Delaware Bay.

In 1898 the Holding Company acquired a majority of the Wilmington & Northern's capital stock, and early in 1900 the Reading Railway leased the road and has been operating it ever since. Thus the Holding Company enlarged and made more secure its grasp upon the ownership, production, sale, and transportation of anthracite coal in and

from the Schuylkill region. The common control by the [246] Holding Company of these two carriers, in and of itself, is said to be a violation of the act of 1890.

(The transactions of the Temple Iron Company are then referred to, but as these are sufficiently described in the former case, reported in (C. C.) 183 Fed. 427, and in 226 U. S. 324, 33 Sup. Ct. 90, 57 L. Ed. 243, and were finally disposed of by the Supreme Court, they need no further attention now. They can only be relevant so far as they may bear upon the intention and the object of other acts complained of in the present action.)

3. *Purchases from other persons.*—In furtherance of the Holding Company's monopoly, it is also charged that the Coal & Iron Company, being itself the producer of more than 80 per cent of all the anthracite carried by the Reading Railway, nevertheless has violated the act of 1890 by buying coal from other producers. This it has done since before 1901, buying from 800,000 to 1,400,000 tons annually, and thereby acquiring control of about 85 per cent of all the anthracite carried by the Reading Railway.

LEHIGH NAVIGATION COMPANY.

Passing now to another subject, the bill takes up the charges against the Lehigh Navigation Company and some of the other defendants:

1. *Transactions between the Lehigh Navigation Company and the Central Railroad.*—As already stated, the Lehigh & Susquehanna Railroad—which extends from the Wyoming region to Phillipsburg on the Delaware River—was built by the Lehigh Navigation Company, and was operated by that company from 1868 until 1871. At Phillipsburg it connects with the Central Railroad, extending to Jersey City, and also with a line to Hoboken now operated by the Delaware, Lackawanna & Western Railroad. It also connects at Phillipsburg with a line now operated by the Pennsylvania Railroad; with the Morris Canal, extending to New York Harbor; and with the Delaware Division Canal, extending to Bristol, on the Delaware River near Philadelphia.

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On March 31, 1871, the Lehigh Navigation Company leased its railroad for a long period to the Central Railroad. It was to receive one-third of the leased railroad's gross receipts, and agreed to ship over that road and other roads operated by the Central all the coal produced by the mines it owned or controlled, or might own or control—except one-fourth of the output of its mines in the Wyoming region, and except also the coal shipped over its canal, and certain other coal not now material. It also agreed that the freight rates upon its canal between points common to the leased railroad and to the canal should as nearly as possible be the same as the rates between the same points on the railroad.

In May, 1883, while the old Reading Railroad was still holding the lines of the Central Railroad under lease, the Reading took the Central's place under the agreement of March, 1871, but modified it as follows: The Reading agreed to develop the property of the Wilkes-Barre Coal Company—whose stock was controlled by the Central—[247] and to ship the product over the Lehigh & Susquehanna Railroad, and agreed, further, that if, in any year, the one-third of the gross receipts that had been reserved as rental by the lease of 1871 should fall short of $1,114,400, the Reading would make up the deficiency, while, on the other hand, if such one-third should exceed $2,043,000 (with certain additions) the Navigation Company would relinquish any claim to the excess. As already stated, however, the lease of the Central Railroad to the old Reading Railroad was set aside, and in June, 1887, the Central was reinstated, and thereupon was confirmed by the Navigation Company as the lessee of the Lehigh & Susquehanna Railroad under the old agreement of 1871, modified by the changes made in 1883.

The bill charges that the practice of the parties to the agreement of March, 1871, has always so construed it that the Lehigh Navigation Company is absolutely bound to ship three-fourths of its output over the lines of the Lehigh & Susquehanna Railroad and of the Central Railroad, except the coal shipped over its canal, and that it cannot escape the obligation by selling its output before shipment. As very little of the Navigation Company's coal is shipped over

its canal—only 6 per cent in 1912—the quantity exempt from the agreement of 1871 is comparatively small.

Since January, 1874, the Central Railroad has owned a majority—now nine-tenths of about $9,200,000—of the Wilkes-Barre Coal Company's capital stock. The two companies have the same president, secretary, and treasurer, and of the Coal Company's seven directors, five until recently—and three now—were also directors of the Railroad. The output of the Coal Company is carried from the mines by the Central Railroad; most of it goes to points outside of Pennsylvania, and, with the output of the Lehigh Navigation Company, constitutes more than 80 per cent of the Central's anthracite tonnage. The funded debt of the Coal Company, nearly $17,000,000, is guaranteed by the Central Railroad, principal and interest, and the Railroad has advanced large sums to the Coal Company, upon which interest has sometimes not been exacted.

At all times, therefore, during the existence of the arrangement of March, 1871, the Central Railroad has controlled the stock of the Wilkes-Barre Coal Company, which is a large owner, miner, and seller of anthracite coal. During the same period (except for a few years) the Lehigh Navigation Company also was a large owner, miner, and seller of coal, and therefore was and still is a potential competitor of the Coal Company. When, therefore, the Lehigh Navigation Company's railroad was turned over to the Central Railroad with an agreement to divide earnings, and to ship nearly all the coal output controlled by each company over the railroad system formed by their joint lines, the Navigation Company and the Central Railroad united in close alliances and community of interest. As evidence thereof, the Navigation Company's report for 1887 is referred to, which states that the contract has had a considerable effect in unifying the interests of the two companies, so that each is likely to benefit by the business of the other.

[248] The Government admits that (under proper conditions) the operation of the Lehigh & Susquehanna Railroad by the Central Railroad—which is the owner, not of a competing, but of a connecting, line—might be lawful and in the

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public interest, but contends that the agreement of March, 1871, violates the act of 1890 for the following reasons:

(1) It suppresses competition in the production and sale of coal between the Lehigh Navigation Company and the Wilkes-Barre Coal Company, because the Central Railroad controls the Coal Company and has formed an alliance with the Navigation Company.

(2) It unreasonably restricts the Navigation Company in the choice of markets and in carrying on its business, because it requires the Navigation Company to ship three-fourths of its output over the railroads operated by the Central Railroad, and because the agreement prevents competition between the Central Railroad and other carriers in the same locality for the transportation of such output.

(3) It suppresses competition between the canal and the railroad of the Navigation Company, because it requires rates between points common to both to be arranged by mutual agreement between the Navigation Company and the Central Railroad.

(Then follow certain averments about the application of the Commodities Clause.)

2. *Control of the Hudson River Railway and of the New England Railroad.*—In 1885 the Lehigh Navigation Company and the Central Railroad jointly bought a majority of the capital stock of the Hudson River Railway, and thereafter jointly advanced money for its improvement and extension. Its present outstanding capital stock is $1,340,000; of this the Navigation Company owns $507,900 and the Central Railroad Company $163,300, together a majority; and they jointly guarantee the principal and interest of about $1,000,000 of its funded debt—$3,229,000. On the board of directors of the Hudson River Railway are the president, the vice president, and a director of the Central Railroad and the vice president of the Navigation Company; and the president of the Hudson River Railway, who is also one of its directors, is a director of the Navigation Company.

In 1904 the Navigation Company acquired a majority, and it now owns substantially the whole of the capital stock of the New England Railroad. The two corporations use the

same general office, and have in common the same president, vice president, secretary, and a majority of the board of directors. The Navigation Company controls the operation of the road, and supplies the capital needed for its business. In reality, therefore, the Navigation Company and the New England Railroad are one and the same association of persons, engaged in mining, selling, and transporting anthracite coal. The New England Railroad carries large quantities of coal that have been mined and are still owned by the Navigation Company.

In 1904, and at all times since, the Hudson River Railway and the New England Railroad, with the connections already described, constituted two potentially competitive and substantially parallel routes [249] of transportation between the anthracite field and points in New York and New England on the systems of the New York Central and the New York, New Haven & Hartford, and over these routes anthracite coal and other freight have been moving in continuous carriage. Then and now there was but one other direct all-rail route between the anthracite field and central and southern New England. It is charged, therefore, that the common control of these two routes through the stock ownership of the allied Lehigh Navigation Company and the Central Railroad prevents competition, and restrains and monopolizes trade, in violation of the act of 1890.

(And the Navigation Company and the New England Railroad are also charged with violating the Commodities Clause.)

The final combination is charged to be as follows:

TRANSACTIONS IN 1901 BETWEEN THE HOLDING COMPANY, THE CENTRAL RAILROAD, AND THE LEHIGH NAVIGATION COMPANY.

Since December, 1896, as already stated, the Holding Company has owned all, or substantially all, the capital stock of the Reading Railway and of the Coal & Iron Company, and nearly all the capital stock of the Wilmington & Northern Railroad and of the Schuylkill Navigation Company,

and it controls the management of these four companies. Since January, 1874, the Central Railroad has owned a majority (now nine-tenths) of the capital stock of the Wilkes-Barre Coal Company, and since before 1901 has had a close alliance and common interest with the Navigation Company. Since 1885 they have jointly controlled the Hudson River Railway through stock ownership, and since 1904 the Navigation Company's stock ownership has controlled the New England Railroad. Since long before 1904 the Navigation Company has operated canals from Mauch Chunk to the Delaware River near Philadelphia.

The Coal & Iron Company is the largest owner, producer, and seller of anthracite coal. Its lands in the Schuylkill region contain many million tons, variously estimated at from 40 to 50 per cent of the unmined deposit. In 1912, which was a typical year, it produced and sent to market 11,000,000 tons, about 16 per cent of the total output. The Wilkes-Barre Coal Company is also a large owner, producer, and seller of coal. Its lands are mainly in the Wyoming region, and have been estimated to contain about 10 per cent of the unmined deposit. In 1912 it produced nearly 5,000,000 tons, and bought from other producers for resale about 700,000 tons, marketing about 7½ per cent of the total output. The Lehigh Navigation Company is another large owner, producer, and seller of coal. Its lands are in the Lehigh region, and have been estimated to contain about 10 per cent of the unmined deposit. In 1912 it produced nearly 4,000,000 tons, or 5 per cent of the total output. Since long prior to 1901 a large part of the coal either mined or bought by the three companies just named has been shipped to the principal Eastern and New England markets, to be there sold or delivered under contracts previously made. Except for the violations of law complained of, they would [250] have been, and would now be, active competitors in the mining, purchasing, shipping, and selling.

Turning from the coal companies to the railroads and canals, the bill goes on to aver:

The Reading Railway has always been distinctively a carrier of anthracite. In 1912 it carried from the mines

nearly 13,000,000 tons, more than 20 per cent of the total output; and in recent years anthracite has formed nearly 60 per cent of the freight traffic originating on its lines, and has formed one-third of its total freight traffic, whether originating on or off its lines. The carriage of coal has furnished from 33⅓ to 40 per cent of its total revenue from freight. The Central Railroad also has been for many years predominantly a carrier of anthracite. In 1912 it carried more than 8,000,000 tons, or 33 per cent of the total shipments from the mines, and in recent years coal has furnished more than 60 per cent of the freight traffic originating on its lines, and more than 30 per cent of its total freight traffic from all sources, yielding from 43 to 50 per cent of its total revenue from freight. The rail and water lines (not the canals), operated since before 1901 by the Reading Railway and by the Central Railroad, have been, and are now, potentially competitive routes of transportation between the anthracite field and points on the Delaware River, Baltimore, Washington, points on the Hudson River, points between Albany and Boston on the New York Central, and points in central and northern New England on the Boston & Maine.

Since before 1901 the Wilmington & Northern Railroad has also been a potential competitor to some extent of the Reading Railway, especially in the transportation of anthracite.

The Hudson River Railway and the New England Railroad, with their connections, are also two potentially competitive and substantially parallel routes of transportation between the anthracite fields and points in New York and New England on the systems of the New York Central and of the New York, New Haven & Hartford; and each of these routes is a potential competitor of the rail and water routes to New England, referred to above as operated by the Reading Railway and the Central Railroad, respectively.

Since before 1901 the canals of the Lehigh Navigation Company and the Schuylkill Navigation Company have been and now are potential competitors of the railroads for transportation between the anthracite field and the Delaware

River near Philadelphia; they are the only all-water routes from these regions to tidewater.

This being the situation in January, 1901, the bill charges that the Holding Company—which already dominated the production and transportation of anthracite in and from the Schuylkill region—undertook to extend the power of the Reading System into the Wyoming and Lehigh regions. With this object it bought a majority—145,000 shares—of the Central Railroad's capital stock for $160 per share, borrowing about $23,000,000 of the purchase money by pledging the shares. By this transaction the Holding Company now controls about 63 per cent of the unmined deposit of coal. Afterwards the Central Railroad acquired and now owns over $4,000,000 of bonds under the gen[251]eral mortgage of the Holding Company and of the Coal & Iron Company. The Holding Company still owns a majority of the Central Railroad's stock, directs the votes thereon, and receives the dividends. Soon after the purchase, the president of the three Reading Companies became the president of the Central Railroad and of the Wilkes-Barre Coal Company, and has continued to fill those offices; and the directorates of these five companies and of the Lehigh Navigation Company have been, and are, interlocking in varying proportions.

The transactions thus outlined were not the results of the normal business development of the Holding Company, but were entered upon in order unduly to restrict competition in the producing, shipping, selling, and transportation of coal. This purpose was carried out:

(1) By uniting under a single control the Coal & Iron Company and the Wilkes-Barre Coal Company, who were competitive owners, producers, shippers, and sellers, and together owned or controlled more than 50 per cent of the unmined deposit, and marketed about 25 per cent of the annual supply.

(2) By uniting under a single control the Reading Railway and the Central Railroad, who were competitive interstate carriers, and together transported about one-third of all the anthracite moving from the mines.

(3) By making the Holding Company—by virtue of its majority ownership in the stock of the Central Railroad—

a party to the alliance and community of interest between the Central Railroad and the Lehigh Navigation Company, the effect being to do three things:

(*a*) To combine the coal business of the Coal & Iron Company, of the Wilkes-Barre Coal Company, and of the Lehigh Navigation Company, who were competitive owners, producers, buyers, shippers, and sellers, and together owned or controlled more than 63 per cent of the unmined deposit, and marketed about 30 per cent of the annual supply.

(*b*) To combine the Reading Railway and two of its competitors, the Central Railroad and the Wilmington & Northern, adding to the combination the Hudson River Railway Company, which operates part of a through route to points in New England, this route being potentially competitive with the rail and water routes that are operated to points in New England by the Reading Railway and by the Central Railroad, and adding the New England Railroad in 1904 (which operates another potentially competitive line) by the agency of the Lehigh Navigation Company's ownership of the New England's stock.

(*c*) To combine the canal of the Schuylkill Navigation Company and the canals of the Lehigh Navigation Company, these being the only all-water routes now operated from the anthracite field to tidewater.

According to some estimates of geologists and engineers, the coal lands owned or controlled by the companies thus combined are likely to outlast by many years the lands of any competitor. In time, therefore, these companies will probably own or control every remaining ton of commercially available anthracite known to exist, and the monopoly that will then exist cannot possibly be broken. In a word, [252] therefore, the ownership by the Holding Company of a controlling interest in the capital stock of the Central Railroad is charged to be an unlawful combination and monopoly, in violation of the act of 1890.

REASONS FOR JOINING SEVERAL CAUSES OF ACTION.

The combination and monopoly resulting from the control exercised by the Holding Company over the allied Cen-

tral Railroad and the Lehigh Navigation Company, and the contributory combinations and monopolies resulting from the control by the Holding Company, by the Central Railroad, and by the Lehigh Navigation Company, over other corporations, are so interrelated that to ask relief in one suit prevents a multiplicity of actions and a confusion of parties and promotes the convenient administration of justice.

And finally it is charged that the asserted violations of the Commodities Clause are also means to effect the asserted violations of the act of 1890.

RELIEF ASKED FOR.

The court is prayed to decree:

1. That the Holding Company, the Coal & Iron Company, the Reading Railway, and the individual defendants, form an unlawful combination and a conspiracy in restraint of interstate and foreign trade, and a monopoly of part of such trade, and to enjoin them from carrying out or maintaining such, or any similar, combination and monopoly.

2. That the Holding Company's control of the Coal & Iron Company and of the Reading Railway through stock ownership is a like combination and monopoly, and to require the Holding Company to dispose of its stock in these two companies to persons not its own stockholders or agents, or otherwise under its control or influence, and, pending such disposition, to enjoin the Holding Company from voting or receiving dividends thereon.

3. That the Coal & Iron Company's purchases from other producers assist, and have assisted, such combination and monopoly, and to enjoin such purchases in the future.

4. That the Holding Company's control of the Schuylkill Navigation Company through stock ownership is a like combination and monopoly, and to require a like disposition of such stock, and, pending such disposition, to enjoin the Holding Company from voting or receiving dividends thereon.

5. That a similar decree be made in reference to the Holding Company's control of the Wilmington & Northern Railroad, through stock ownership, and through the lease of that railroad by the Reading Railway, and to direct the lease to be canceled.

6. That the agreement of 1871, with its later modifications, between the Central Railroad and the Lehigh Navigation Company, for the lease of the Lehigh & Susquehanna Railroad, is a like combination and monopoly, and to direct it to be canceled, and to enjoin the parties from carrying it out, unless they modify it further: (*a*) By making the rental a fixed sum, instead of a proportion of the Lehigh & [253] Susquehanna's receipts; (*b*) by striking out the provision that the Navigation Company must ship most of its output over the leased railroad and over the other lines operated by the Central Railroad; and (*c*) by striking out the provision in reference to rates between common points on the canal and railroad.

7. That the control of the Hudson River Railway and of the New England Railroad by the Lehigh Navigation Company and the Central Railroad through stock ownership therein is a like combination and monopoly, and to require a like disposition of these stocks, and meanwhile to enjoin the Navigation Company and the Central Railroad from voting or receiving dividends thereon.

8. That the Holding Company's control of the Central Railroad's capital stock is a like combination and monopoly, and to require a like disposition of such stock, and meanwhile to enjoin the Holding Company from voting or receiving dividends thereon.

9. That the Holding Company, in and of itself, is a like combination and monopoly.

(The prayers based upon the Commodities Clause will be considered separately.)

ANSWERS OF DEFENDANTS.

The foregoing is a fairly complete summary of the bill. The answers of the defendants may be dealt with more briefly. With a few exceptions, the facts set forth in the

bill—meaning thereby the acts done, and the agreements made—are admitted; but the inferences sought to be drawn therefrom by the Government are denied generally and specifically, and the position is taken that these acts and agreements were not, and are not, in violation of law, and have not produced the unlawful and injurious effects charged. Some of the new matters set up are as follows:

The answer of the *Holding Company* avers that since it acquired the capital stock of the Coal & Iron Company in 1896 its loans to that company have been temporary and commercial in character—such loans as large business enterprises commonly obtain during the months of production that precede the sale of their product—and that these loans have been usually repaid with 4 per cent interest within a few months after they are made. The answer also avers that the $12,000,000 advanced to the Coal & Iron Company was to pay prior liens on its property, and was obtained by selling part of the bonds specially retained for this and other purposes in the general mortgage of January, 1897. With reference to the reorganization in 1896, the answer denies that either then or at any other time the Holding Company became an instrument to accomplish any unlawful or improper purpose, or to accomplish a lawful purpose in an unlawful or improper way—averring, on the contrary, that the plan of reorganization was prepared and carried out in order to save large investments of the public, which had been encouraged by the laws of the land and had been made in compliance therewith, for the purpose of promoting praiseworthy and beneficial enterprises; that the plan was intended to continue these enterprises and advance their growth and development, and was prepared and carried out in reliance on [254] the rule of law that to discover a legal way to reach a lawful result is not an illegal evasion. With reference to the purchase of the Central Railroad's shares, the answer avers that the purchase was in the normal course of lawful business development, because the Central Railroad's system and the Reading Railway's system had been for 40 years connecting lines, supplementing each other in forming through routes for the com-

merce of the country, each line being a necessary outlet for much of the other's traffic, and avers, further, that these through routes should be maintained, because, instead of restraining trade, they are of vast importance in promoting it.

The answer of the *Coal & Iron Company*—while admitting the control for many years (through stock ownership and by lease) of the Tremont and other coal companies, which owned about 9,000 acres of coal lands in the Schuylkill region—goes on to aver that all these shares and all its own coal lands, purchased or otherwise acquired, were obtained in the normal course of its lawful corporate business, and in the exercise of the lawful powers granted by its charter, and avers, further, that these lands were acquired with the purpose of mining them as soon as practicable, and thus of securing the means of competing continuously in producing and selling the very commodity that it was chartered to mine and sell. With reference to the purchases of coal from other producers, it avers that such purchases were in the usual course of business, have always been made from the beginning of its active operations, and in fact were made by the receivers appointed by the United States court during the three receiverships that extended (with an interval of five years) from May, 1880, to December, 1896, and avers further, that such purchases were made in the lawful exercise of lawful powers and in the usual course of business, and are neither influenced nor constrained, but are made only because both parties find them advantageous, economical, and otherwise profitable. With reference to the advances made by the old Reading Railroad, it declares the transactions to have been natural and lawful; the object being to aid the Coal & Iron Company to acquire coal lands, the shares of other coal mining companies, and shipping and marketing facilities, so that the lands might be developed and the production and sale of anthracite might be increased. The amount of these advances is as follows:

1. A mortgage bond, dated July 1, 1874	$30,000,000.00
2. A mortgage bond, dated December 28, 1876	10,000,000.00
3. Cash advances	24,879,336.16
4. Current business account, about	4,800,000.00

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By far the largest part of this indebtedness accrued long prior to 1890, and most of it prior to 1887; these advances and the old Railroad's guaranty both being authorized by law.

The answer of the *Reading Railway* avers that it has always been a carrier not only of anthracite but also of bituminous coal and of general merchandise. In 1912, while it carried 11,225,000 tons of anthracite, it carried nearly 15,000,000 tons of bituminous coal, and nearly 23,000,000 tons of general merchandise. It denies that the old [255] Reading Railroad violated any law by acquiring the capital stock of the Coal & Iron Company in 1871, or by buying or guaranteeing its bonds, since the Coal & Iron Company's charter expressly made it lawful "for any railroad or mining company existing under the laws of this State to subscribe for or purchase the stock, or to purchase or guarantee the bonds, of the company hereby incorporated." With reference to the canal of the Schuylkill Navigation Company, it denies that the contract of the old Railroad Company—which was duly authorized by a Pennsylvania statute of April 14, 1870 (P. L. 75)—or the old Railroad's acquisition of a large part of the Navigation Company's capital stock, was intended to suppress competition in the transportation of coal by the canal, or in any way tended to monopoly of that sort, denying the diversion of such traffic to the Railroad. On the contrary, it avers that the channel of the canal does not reach the mines—the points of origin of the coal—and cannot make the deliveries required by the markets at the points of destination, that purchasers of coal will not tolerate the slow transportation by canal when transportation by rail can be obtained, and that the services necessary in the carriage or delivery of anthracite cannot be economically performed by the canal. It denies, therefore, that the canal is, or could be, an active competitor of the Railway in carrying coal from the mines to tidewater at Philadelphia or to intermediate points.

The *Central Railroad's* answer details the steps that led up to the contract of March, 1871, by which the Lehigh & Susquehanna Railroad was leased from the Lehigh Naviga-

tion Company. At first—in 1847—the Central was a short local railroad in New Jersey, but afterwards grew (always under legislative authority) into a through route across New Jersey from Easton, on the Delaware River, to New York Harbor. Its connections were of great importance. At Easton it connected with the Lehigh Valley Railroad; opposite Easton, with the Lehigh & Susquehanna Railroad; at Hampton, a few miles farther east, with the Delaware, Lackawanna & Western Railroad; and it also had a through connection to the west by way of Easton, Reading, and Harrisburg, known as the "Allentown route," over the Lehigh Valley, the old Reading Railroad, and the Pennsylvania. From all these sources it received much business, and in order to take care of this business it was obliged to spend a great deal of money in construction and in terminal and other facilities. For example, at one time it was compelled to have a third rail in order to accommodate the Lackawanna cars, which were then of broad gauge. In 1871 the loss of a large part of this business was threatened. The Lehigh Valley had acquired or was acquiring a line of its own to New York Harbor. So was the Lackawanna; while the Lehigh Navigation Company's railroad was apparently on the point of making a traffic arrangement with the Lackawanna. The Allentown route had been disrupted, and the Pennsylvania's traffic had been lost. In this situation—having lost the Pennsylvania's traffic, much of the Lehigh Valley's traffic, with a prospect of losing the rest, and all the passenger and general freight traffic of the Lackawanna, with a prospect of losing its coal also—the Central was compelled to decide whether it would abandon competition [256] with its rivals and resume its local character or would become an active competitor. Choosing the latter course, it entered the anthracite field by making the lease in question. The arrangement benefited the public by creating and maintaining a through route; it benefited the Central's stockholders by giving them a permanent Pennsylvania connection; and it benefited the Lehigh Navigation Company's stockholders by giving them a tidewater outlet for their coal. The answer denies, further, that either now or recently the Central has operated vessels to Long

Island Sound or to New England (the Wilkes-Barre Coal Company now owning and operating the fleet), and denies also (as do several other answers also) that the carriage of anthracite by railroad, at the rates now and for a long time past in force, has been or is enormously profitable.

The *Wilkes-Barre Coal Company* admits the purchase of coal from other producers, but avers the lawfulness and customary character of the transaction, declaring that it neither influences nor constrains such contracts, which are entered into only because the parties find them mutually advantageous, economical, and otherwise profitable. It also avers its active competition at all times with other coal-producing companies. In August, 1912, the Coal Company bought, and shortly afterwards paid for, the tugs and barges of the Central Railroad, and since that time has operated them between New York Harbor and New England.

The *Wilmington & Northern Railroad* avers that anthracite is, and has been, a comparatively small part of its freight; its principal freight being, as it has always been, iron and steel and the raw materials entering into their manufacture, and, next to these, agricultural and dairy products. It avers, also, that its line is and has always been connecting and supplementary with the Reading Railway, having been built for this very purpose—the two lines forming a natural, direct, through route from points on one to points on the other—and that to maintain such a route aids commerce instead of restraining it.

The *Lehigh Navigation Company's* answer sets forth, inter alia, as follows:

Certain persons named in a very early Pennsylvania statute were interested in coal mines near Mauch Chunk, on the Lehigh River, and in the improvement of the river in order to market their coal. By a canal and slack-water navigation, afterwards constructed by them or by their successors, coal was carried down the river to Easton, where it met the Delaware Division Canal, which had been built by the State of Pennsylvania from Easton to tidewater on the Delaware River. Thus coal could be brought from the Lehigh region to Philadelphia and its neighborhood. Later, in 1837, the

Navigation Company was authorized to build a railroad from its canal over the mountain into the Wyoming region. In 1862, after part of the canal had been swept away by floods, the legislature permitted this gap to be replaced by a railroad. In 1864 the Navigation Company was empowered to extend the railroad to Easton, and bridge the Delaware River to Phillipsburg. The Navigation Company also owned a large acreage in the Wyoming region, and controlled (through stock ownership in the Honey Brook [257] Coal Company) other lands in the Lehigh region. The motive and purpose, therefore, for the construction of the canal and the railroad, were to afford a market for the coal mined in those regions, and these public highways would never have been built if much of the coal had not been owned by their builders. The Navigation Company is the lessee of the Delaware Division Canal under authority from the State of Pennsylvania, and avers that over neither canal has it exercised any other than a lawful power. With reference to the agreement of March, 1871, with the Central Railroad, it avers that the main purpose of the modification made in 1883 was to prevent the old Reading Railroad (after it had acquired control of the Navigation Company's railroad) from diverting the Wyoming coal and other traffic in favor of the Reading's own lines, and it denies any practice by the parties modifying the terms of the agreement. It admits that, out of 200,000 shares, it owns 500 shares of the Wilkes-Barre Coal Company's stock, and explains that these were bought to protect a debt for which they had been pledged; and it denies any concert of action with the Central Railroad in the management of the Wilkes-Barre Coal Company in order to suppress competition.

With reference to the Hudson River Railway, the Navigation Company denies having control of its policy or management, either alone or jointly with the Central Railroad, and either directly or indirectly.

With reference to the New England Railroad, it details the steps in the organization of that company. Originally, two small roads existed that the Navigation Company had acquired as feeders from certain slate quarries to its own railroad, the Lehigh & Susquehanna. In 1904 it undertook

to increase the traffic over these two roads by securing an entrance into New England over the New York, New Haven & Hartford system. One of these two roads had a connection in Pennsylvania with the New England Railroad, which was then operating a line (under various arrangements) from Slatington, Pa., to Campbell Hall, N. Y., where it connected with roads running into New England. With the object stated—the increase of traffic over the two roads referred to—the Navigation Company acquired the capital stock of the New England Railroad, and merged the three roads. Thus enlarged, the New England Railroad connects with the Central Railroad at Bethlehem, and with the Lehigh Valley at Slatington. It has other connections also—at Campbell Hall with the New York, New Haven & Hartford, with the West Shore, with the Erie, and with the New York, Ontario & Western; at Slatington with the Reading Railway; at Martins Creek with the Pennsylvania; at Portland, with the Delaware, Lackawanna & Western; and at Hainesburg Junction with the New York, Susquehanna & Western. From this junction point it reaches tidewater at New York under a trackage agreement with the New York, Susquehanna & Western. Moreover, the Navigation Company desired a direct outlet from its mines in the Panther Creek Valley to New England points by the way of the New England Railroad. Neither the Central Railroad nor the Lehigh Valley (both of whose lines connect with the New England Railroad) would agree to a suitable through rate and traffic arrangement, and accordingly the [258] Navigation Company determined to extend the New England Railroad to Tamaqua, where a connection could be made with the Panther Creek Railroad. The extension was built in 1911–12, and the reasons therefor were to provide an additional outlet to market for coal from the Schuylkill and Lehigh regions, and to compete in rates and facilities with the lines of the Lehigh Valley and of the Central Railroad. In June, 1913, the Panther Creek Railroad with its equipment was bought by the New England Railroad, and the two roads were merged and are now operated by the New England Railroad. As now extended, the New England Railroad is the most direct route from

these two regions to points in New England. Thus a new competitor was introduced, railroad competition was stimulated, and shippers were benefited.

The answer of the *New England Railroad* avers that its lines serve the slate, the cement, and other industries, only about 25 per cent of its tonnage being anthracite. Its lines did not reach the coal field until 1912. It avers, also, that its most important extension is the most recent, by which the Navigation Company's gathering railroad (the Panther Creek) is reached at Tamaqua, because this connection has given the Navigation Company better routes and facilities, has given it an additional route not before available to tidewater at New York and also to points reached by the Lehigh Valley system, and has also opened an additional route from the Navigation Company's mines, not only to the slate and the cement regions of Pennsylvania, but also to other points in New Jersey, New York, and New England. The answer avers, further, that since the New England's stock was acquired by the Navigation Company competition by railroad has been stimulated, because the Navigation Company has supplied the necessary capital for improvements, extensions, and equipment. As an example, it avers that, whereas coal shipped from the Lehigh and the Schuylkill regions to New England points over the Poughkeepsie bridge route were formerly carried by the Hudson River Railway, the New England Railroad now carries a proportion of this tonnage, this being a result of the connection made with the Panther Creek Railroad. It denies that a common control governs the New England Railroad and the Hudson River Railway, and avers that the persons in control of the latter have no financial or other interest in the former, and no voice or influence in its management and operation. It declares itself to be a competitor of the Central Railroad and of other lines in carrying coal and other commodities to tidewater, to New England, and to other points, and denies the existence of restrictive agreements with any of them. For years, especially since 1900, its extension has been constant, its usefulness as a common carrier has increased, and its facilities have served the public better. It has given the Lehigh Navigation Company and all other shippers additional communication with

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points in New York, in New England, and in the West, and its conduct as a common carrier has been fair and without discrimination. Its present status is declared to be vital to the welfare of the Navigation Company, and to vast cement, slate, and other industries, and any interference therewith would be likely to result [259] in some competitive and antagonistic interest obtaining control, to the detriment of the territory now served by its lines.

The answer of the *Hudson River Railway* avers that it has repaid the money advanced by the Lehigh Navigation Company and the Central Railroad, and that these advances were made to build and maintain a line to be operated by the Hudson River Railway in competition with the then existing lines between points in New England and in the section immediately west thereof, so as to facilitate traffic between these points. It avers, further, that after its lines were extended its traffic did increase greatly, thus justifying the extension and benefiting the public and other railroad companies not parties to this suit. It avers that its traffic rates and charges have largely diminished during the period referred to, and that traffic is carried over its lines as cheaply as by any other railroad operating by any route between the same points.

Other matters will be touched upon in the course of the discussion. The following diagram may make the situation easier to comprehend. There are two groups of corporations, headed by the Holding Company and by the Lehigh Navigation Company, respectively:

1. HOLDING CO. owns stock of
- Schuylkill Navigation Company
- Wilmington & Northern Railroad
- Reading Railway (which is also lessee of the Wilmington & Northern Railroad)
- Coal & Iron Company
- Central Railroad
  - which owns stock of
    - Wilkes-Barre Coal Co.
    - Hudson River Ry. (in part)
  - and is lessee of Lehigh & Susq. R. R. (which belongs to the Lehigh Nav. Co.)

Lease of March, 1871

2. LEHIGH NAV. CO., whose stock is not owned by the other companies, owns
- Lehigh & Susquehanna Railroad (but leased it in March, 1871, to the Central Railroad)
- Lehigh Canal (and is also the lessee of its continuation, the Delaware Division Canal)

And owns stock of
- Hudson River Railway (in part)
- New England Railroad

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DISCUSSION.

Without going into details, we may dispose briefly of one or two matters.

First. *The quantity of the unmined deposit.* On this subject opinions differ, and in the nature of things the quantity cannot be accurately measured. The only light that is available comes from calculations that vary in results, and some of the evidence warns us to be cautious in relying upon these estimates. For present purposes we think it sufficient to say that the unmined deposit seems to be very large indeed; it is not likely to be exhausted for two or three generations at least, even at the rate of mining now practised. We feel justified, therefore, in leaving the remoter future to take care of itself; our concern is with the present, and with so much of the future as lies fairly near. Accordingly, we shall not attempt to estimate in hundreds of millions the tons still in the ground, but shall [260] content ourselves with the rather vague, but we think the sufficient, statement that the field still contains a supply that will apparently supply the demand for not less, probably for much more, than 50 years.

Second. *The canals and the Wilmington & Northern Railroad.* Little need be said about these. The evidence satisfies us that all of them are negligible factors, which may be disregarded. The bill may therefore be dismissed as to the Wilmington & Northern Railroad, and relief will be denied as to the canals.

But the other transactions need further consideration, and these will now receive attention.

LEHIGH NAVIGATION COMPANY.

[1] Evidently the relation of the Lehigh Navigation Company to the Holding Company is a matter of much importance, and seems to come first in order. As will be observed, the essential connection between the two principal groups is the lease of the Lehigh and Susquehanna Railroad, made in 1871, and modified in 1883 and 1887. If the lease is not in violation of law, the Navigation group drops out of this liti-

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gation. We may dismiss from consideration the minor charge concerning the holding of stock by the Navigation Company and by the Central Railroad in the Alliance Coal Company and the Wilkes-Barre Coal Company. The stock of the Alliance Company consists of 90,000 shares. Of these, the Navigation Company holds 83,920, and the Central Railroad 6,000; the remaining 80 shares being held by other interests. The stock of the Wilkes-Barre Coal Company consists of 184,250 shares. Of these the Central Railroad holds 169,823, and the Navigation Company 500 (which it took originally as collateral for a note, and was obliged to buy in when its debtor made default); the remaining 13,927 shares being held by other interests. The evidence does not show that the holdings in these two companies owned by the Navigation Company and by the Central Railroad, respectively, have been unlawfully used in combination or otherwise; on the contrary, the Navigation Company and the Wilkes-Barre Coal Company have been active competitors for the sale of coal during many years. And so, also, we may dismiss the charge about certain lateral allowances in freight rates on coal. If they are objectionable for any reason, the correction cannot be made in this forum; the Interstate Commerce Commission has primary jurisdiction of these matters, and to that tribunal the Government or any other complainant must be referred.

Turning now to the lease of 1871, we may say, first, that of course neither party could have intended then to violate a Federal statute that was not passed until nearly 20 years afterward. The reasons for making the lease have already been referred to, but they may be stated again. The parties acted under legislative sanction, and we are satisfied that the agreement was greatly to the benefit of both companies. Indeed (since the Lehigh Canal need not be considered), the Government attacks the lease on two grounds only: (1) Because it suppressed competition between the Navigation Company and the Wilkes-Barre Coal Company in the production and sale of anthracite; and (2) because it requires the Navigation Company to ship [261] three-fourths of its output over the Central Railroad, and thereby restricts un-

reasonably the Navigation Company's freedom to select its own markets and otherwise to carry on its business, thus preventing other carriers in the same locality from competing with the Central Railroad for the carrying of such output.

The answer to the first objection is to be found in the evidence; the lease fostered competition, instead of suppressing it. The reasons that induced the Navigation Company to lease its railroad are fully set forth in the following report made by the board of managers to a special meeting of stockholders held March 28, 1871:

"The stockholders have been called together to consider and act upon a lease to the Central Railroad Company of New Jersey of the railroads owned and controlled by this company, and also to consider an act of the legislature giving the company authority to fund and consolidate their various forms of indebtedness.

"To understand fully the causes which led to the negotiations which have terminated in the lease of our railroads, it is necessary to refer to events which have transpired during the last three years.

"The Lehigh & Susquehanna Railroad was opened for business throughout its entire length early in 1868, when the coal trade was greatly depressed, and the company, already burdened with debts incurred in its construction, found it necessary to incur further obligations, at high rates of interest, to equip the road and increase its facilities for business, without which it could not be a source of any considerable revenue to the company.

"The capacity of the railroads across the State of New Jersey to transport coal was then limited by inadequate terminal facilities or insufficiency of motive power, and, with other large roads previously in the field pressing coal upon them, we had from the first a contest to secure proper facilities for the transportation of the coal carried to the Delaware River by our railroad for markets beyond. A contract made with the Morris & Essex Railroad Company, in September, 1868, provided railroad transportation and terminal facilities for only a portion of what we had to offer, and that only for a period of five years, and it was not until the fall of 1869 that we could secure adequate terminal facilities from the Central Railroad of New Jersey, although they were ready at an earlier period to transport coal for us. The uncertain tenure secured in 1869 was, after negotiations extending during a period of nearly a year, rendered reliable and satisfactory for a limited period by a contract executed on 1st November, 1870, which secured to the company full terminal and other facilities for all the coal we might be prepared to offer to the Central Railroad of New Jersey during the running

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of the contract, and a prorate of charges on coal from the Wyoming region to tide. Until the execution of this contract—which continues in force for four years, and is subject to termination six months thereafter—we had no satisfactory arrangement for the delivery in New York waters of the great bulk of the coal offered to us for transportation by railroad. These contracts, however, extend only for a few years, at the expiration of which time the Lehigh & Susquehanna Railroad might find itself in an isolated position. Its principal business must ever be the transportation of coal and other merchandise to New York or its vicinity, to which three New Jersey roads offered certain facilities—the Morris & Essex, Belvidere Delaware, and the Central Railroad of New Jersey. The Morris & Essex, since the contract made with it in 1868, had fallen into the hands of a rival coal company, whose roads were extending to points reached by the Lehigh & Susquehanna Railroad, so that its interests would be adverse to fostering the interests of this company. The Belvidere Delaware Railroad is owned by the Camden & Amboy Railroad Company, which is well known to be negotiating to transfer its roads to a company whose interests are not identical with our own, and which might not be disposed to aid us in furnishing facilities for developing a large business in the future. Should the Central Railroad Company—thus left as our only satisfactory outlet—join its interests to others antagonistic to our own, we would, at the expiration of our [262] contract, be left at the mercy of our rivals, or be obliged to protect the millions already invested by a further expenditure to aid in building a new railroad across New Jersey.

"The contracts with the New Jersey roads were for the transportation of coal only, and we had not satisfactory arrangement for passengers and general merchandise. For the development of these branches of the business we felt the necessity of an immediate alliance with a company which controlled a New York terminus. The present lease must increase our revenue from these sources very largely.

"Freshets and strikes and a dull coal market for some years past have rendered it difficult for the company to provide means for the double tracking and further equipment of our roads as rapidly as needed and for the development of our valuable mining properties. We have therefore sought an alliance with another company, which would offer to that company, upon terms mutually advantageous, inducements to provide means for the development of all our interests. The result of these negotiations has been an agreement for a lease of our railroads to the Central Railroad Company of New Jersey on the following terms: [Then follow the details of the lease.]

"The results expected from this lease are—

"First. The entire relief of this company from any demands for further equipment. It relieves it also from the necessity of future expenditure for the extension of the road and its branches, required

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by the increase of its business, until we can secure the means at reasonable rates.

"Second. We secure the full influence and all the facilities of a powerful corporation, controlling the shortest and best line across New Jersey, in the development of the trade of all kinds on our line of railroad.

"Third. Many collateral advantages will result to our different interests from this lease, which cannot be secured by direct covenants, but must result from the efficient operation of the line and the alliance thus secured between the two companies.

"Fourth. A moderate increase on the gross receipts of last year, when our own mines were idle for six months, the mines of our principal transporter not fully opened, rates low, and business in all branches dull, will give us a sufficient revenue from the road alone to pay all of our interest beyond that provided by our miscellaneous receipts, other than those from our canals and from the mining of coal. We anticipate a steady growth of business, and believe that it will not be long before the revenue derived from this lease will considerably exceed the interest of our entire indebtedness.

"The confirmation of this lease by the stockholders will leave the company—as during the period of its greatest prosperity—a 'coal and navigation' company, with its canal and valuable Lehigh coal property, its large amount of real estate, becoming more valuable from year to year, and in addition the recently acquired tracts of first-class coal lands in the Wyoming region, which promise in the future to be a large and increasing source of revenue; also, the control of the transportation of the product of other tracts equally large and more fully developed. If the result of this negotiation shall be a return to the prosperity of that period, the managers will have great cause of satisfaction with their work."

To this we may add the following extract from the report of May 2, 1871:

"In addition to the reasons stated at the special meeting, as among those which induced the managers to enter into the negotiations for the lease, may be added the difficulty of carrying our large and increasing floating debt. The railroads were making demands on our resources for additional sidings, tracks, buildings, and equipment; and by leasing them we are not only relieved from all demands for equipment, and any present demands for money for additions to the road, but have also secured financial aid which will enable us to pay off a portion of the floating debt and fund the remainder. The sale to the Central Company of materials, machinery, and securities, including a million of bonds of our proposed general mortgage, will give us $1,500,000, and this amount, with our net receipts during the first four months after resump[369]tion of work at the mines, will reduce our floating debt to less than $1,000,000. This sum we expect to provide for hereafter by the sale of bonds."

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The dangerous position of the Central Railroad has already been stated in the summary of its answer given above, but for convenience we repeat the summary here:

"The Central Railroad's answer details the steps that led up to the contract of March, 1871, by which the Lehigh & Susquehanna Railroad was leased from the Lehigh Navigation Company. At first—in 1847—the Central was a short local railroad in New Jersey, but afterwards grew (always under legislative authority) into a through route across New Jersey from Easton, on the Delaware River, to New York Harbor. Its connections were of great importance. At Easton it connected with the Lehigh Valley Railroad; opposite Easton, with the Lehigh & Susquehanna Railroad; at Hampton, a few miles farther east, with the Delaware, Lackawanna & Western Railroad; and it also had a through connection to the West by the way of Easton, Reading, and Harrisburg, known as the 'Allentown route,' over the Lehigh Valley, the old Reading Railroad, and the Pennsylvania. From all these sources it received much business, and in order to take care of this business it was obliged to spend a great deal of money in construction and in terminal and other facilities. For example, at one time it was compelled to have a third rail in order to accommodate the Lackawanna cars, which were then of broad gauge. In 1871 the loss of a large part of this business was threatened. The Lehigh Valley had acquired or was acquiring a line of its own to New York Harbor; so was the Lackawanna; while the Lehigh Navigation Company's railroad was apparently on the point of making a traffic arrangement with the Lackawanna. The Allentown route had been disrupted, and the Pennsylvania's traffic had been lost. In this situation—having lost the Pennsylvania's traffic, much of the Lehigh Valley's traffic, with a prospect of losing the rest, and all the passenger and general freight traffic of the Lackawanna, with a prospect of losing its coal also—the Central was compelled to decide whether it would abandon competition with its rivals and resume its local character, or would become an active competitor. Choosing the latter course, it entered the anthracite field by making the lease in question. The arrangement benefited the public by creating and maintaining a through route; it benefited the Central's stockholders by giving them a permanent Pennsylvania connection; and it benefited the Lehigh Navigation Company's stockholders by giving them a tidewater outlet for their coal."

The foregoing are the facts, and we think they show that both the Navigation Company and the Central Railroad were confronting an alarming situation. The Navigation Company was likely either to be shut out from New York, the most important tidewater market, or at all events to be

greatly hampered in reaching it. Unless that market could be reached on favorable terms, the company could not sell its coal in competition with the coal carried by the Lehigh Valley and by the Lackawanna & Western Railroad. If, however, the Central Railroad's route could be definitely secured, the Navigation Company could compete, and the evidence is clear that it has actively competed, and does still compete, not only with the Lehigh Valley Coal Company and the Lackawanna Coal Company, but also with the coal of the Wilkes-Barre Company, although this is the Central Railroad's own especial feeder. We think it should be distinctly noted that with rare exceptions competition for the carriage of the same anthracite coal does not exist. Each carrying company has its own tributary mines, and (largely by reason of topographical conditions) these are not reached, and are not likely to be reached, by any other carrier. The [264] coal is brought to the surface and prepared for market at the mines; it is there loaded upon the cars of the carrier that serves the particular mine, and by these cars it goes forward, either to its ultimate destination, or to the barges that complete the carriage when water transportation is either necessary or desirable. The competition is in the markets, and it would be idle for one carrier to attempt to interfere with a rival's traffic. The carriers might combine to fix rates at an oppressive sum; but no such combination is charged in this bill, and obviously the question whether a rate is extortionate is to be determined, not by the courts, but by the Interstate Commerce Commission.

Neither do we think the second reason is sustained by the evidence. The lease in question provides that the Central Railroad shall pay as rental one-third of the Lehigh & Susquehanna's gross receipts, with a further provision that all the coal mined by the Navigation Company from its lands, then owned or thereafter acquired, should be sent to market over the Lehigh & Susquehanna and the roads of the Central Railroad, "when destined to points or markets reached by the said roads; and, when destined for markets not so reached, it shall be sent as far as practicable over said roads. * * *" But this covenant did not apply to one-fourth

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of the coal mined by the Navigation Company in the Wyoming region; this might be sent to any market "not reached by lines running toward the Delaware River." In 1883 the lease was so modified that, whenever one-third of the gross receipts should fall short of $1,114,400, the lessee should make up the deficiency; but, whenever one-third should exceed $2,043,000, the Navigation Company should relinquish any claim to the excess. And in 1887 another change was made, permitting the one-fourth referred to above to be sent to market over other lines than the Lehigh & Susquehanna Railroad and its branches, if by so doing the Navigation Company could realize a larger price or profit than it would have realized if the coal had been shipped over the Lehigh & Susquehanna.

We cannot discover from the evidence that these covenants impose unlawful restrictions on the Navigation Company's shipments. The best markets for anthracite coal are New York, Pennsylvania, New Jersey, and New England; about 75 per cent of the total tonnage from the whole region goes to these markets, and the Navigation Company sends about the same percentage as the other producers. It has plenty of coal available for the Western market, but for reasons of economy it prefers to restrict its shipments in that direction. This restriction, however, is voluntary, and is due to the fact that its coal can be sold elsewhere to better advantage. Moreover, while its interest is best advanced by shipping a large proportion of its coal to markets reached by the Central Railroad, it evidently does not regard itself as "absolutely bound" (to use the Government's phrase) to ship three-fourths of its output over that road; for in 1912 these shipments were 70 per cent only, and in 1913 were 67 per cent only. And its production has not been diminished, but, on the contrary, has largely increased. As stated in its report for 1906 given in evidence by the Government, its percentage of increase in this particular was [265] largely in excess of the percentage among its competitors throughout the region; and the testimony shows that its total production now is in excess of 3,500,000 tons, more than double what it was 15 or 20 years ago.

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With regard to the rental, the Government's objection is based on the argument that, because the Navigation Company and the Central Railroad share in the gross receipts of the leased road, they are in effect partners in its operation. This is evident also from the Government's prayer in this respect, which asks that the rental be made "a fixed sum instead of a proportion of the receipts from the operation of" the Lehigh & Susquehanna Railroad. The minimum and maximum provisions go a considerable distance in that direction already, and we think it is a practical and sufficient answer to the objection that since 1901 (except in 1902, the year of the well-known strike) the maximum rental has always been reached, and is therefore a fixed sum now. And it is likely so to continue, for under the present conditions the maximum will ordinarily be reached three or four months before the end of the year, so that a considerable margin for contingencies exists.

For the reasons thus given we are of the opinion that the lease of the Lehigh & Susquehanna Railroad does not offend against the laws of the United States. It follows that the unlawful connection charged by the Government to exist between the two groups referred to above has not been proved, and that the Lehigh Navigation group should be excluded from further consideration. If the corporations embraced therein have otherwise offended against the Federal statutes, they should be attacked separately; and therefore the bill will be dismissed as to them, but without prejudice to the Government's right to take such other action as may appear desirable.

THE READING GROUP.

Since the bill is also to be dismissed as far as the Schuylkill Navigation Company and the Wilmington & Northern Railroad are concerned, we have left for consideration the charges against the Holding Company, the Coal & Iron Company, the Reading Railway, and the Central Railroad in its relation to the Reading interests.

We do not think much time need be spent upon the charges that antedate the Reading reorganization in 1896. The bill

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makes certain averments of illegal and improper conduct during the earlier period against the old Reading *Railroad* and the Coal & Iron Company, and these are vigorously and circumstantially denied; but we do not feel called upon to go back to that period in order to apportion whatever blame may now appear to be deserved. It was a time of unrestrained competition, of violent industrial warfare, and of legislation believed now by many persons to have been unwise. As a matter of common knowledge we may take note of the fact that during that period much was done that is condemned at present by general opinion, although the practices now reprobated were then the commonplaces of business in some of its most important branches. Such transactions cannot be fairly judged, except by realizing the situation that was then pre[266]sented and applying the standards that were then accepted without much dissent; and we see no need to essay that difficult task. It is sufficient, we think, to take the actual condition of things at the time of the reorganization—no matter how that condition had come to exist—and to see how it was dealt with thereafter. We are now considering the suit so far as it is based on the act of 1890—the Commodities Clause will be taken up hereafter—and the defendants do not deny the obligation to conform their conduct to the commands of that statute. We think they are not to be held liable in this proceeding for transactions that took place before the intervention of Congress.

And we may say in passing that we lay no weight upon the fact that for three years—from 1893 to 1896—the old Reading Railroad and the Coal & Iron Company were in the hands of receivers, and were administered by the United States court in this district. Of course it is not to be assumed that their business was carried on during those years in violation of law; as far as we are advised, no such question was ever raised or suggested; the court simply took the Coal & Iron Company and the old Railroad as it found them, and conducted their business while a plan for reorganization was being perfected, and then made the necessary decree to carry the plan into effect. We do not know whether the act of 1890

was considered in its relation to the plan, and we approach the consideration of the present charges uninfluenced by the former action of the court.

[2] We have then before us a group of three corporations as they appear after the reorganization was complete. One of them is a mining company, one a carrying company, and the other is a holding company owning the capital stocks of the other two. This relation has had the sanction of the Pennsylvania statutes; but the Federal law is supreme in the field of interstate and foreign commerce, and the law of a State cannot authorize its citizens, either individual or corporate, to violate a constitutional act of Congress. *Phila., B. & W. R. Co.* v. *Schubert*, 224 U. S. 603, 32 Sup. Ct. 589, 56 L. Ed. 911. The three companies are no doubt combined; but the important question remains: Is the combination unlawful? Does it unreasonably restrain trade in anthracite coal? And by "trade" we mean the production and marketing of that article.

There has been a recent occasion in this district to consider the scope of the act of 1890 (*U. S.* v. *Keystone, etc., Co.* [D. C.] 218 Fed. 502), and we shall not repeat what was said in that case. But, as the defendant there was a manufacturer, while other kinds of business are now in question, it may be proper to add a few words on the particular subject in hand.

As we have already stated, the Government does not attack the mining company—the Coal & Iron Company—for the bill expressly states:

"Whether the [Coal & Iron] Company in and of itself is a combination in restraint of interstate trade and commerce, or a monopolization of a part thereof, is an issue not now tendered or intended to be raised in the present proceeding."

[267] It is not difficult to see good reasons for this position. Coal is of no use while it remains in the ground. Its use is to be burnt, and no one can use it until it is brought within convenient reach. Obviously, then, whoever mines and prepares it for consumption performs a service to be commended. Moreover, the owner of coal in the ground, who has no other interest in the mineral than to

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sell it, is not in the position of an ordinary merchant who buys goods from the manufacturer in order to sell them again to the ultimate consumer. The stock of such a merchant is in process of continual renewal; as long as the mills are running his source of supply is always open, and he need not be greatly concerned about keeping a large stock on hand. But a miner's stock is in the ground; he is his own source of supply, and he can only continue to sell as long as his mine continues to produce. It is vitally important to him, therefore, that he should have a large reserve on which he may draw; for he must go out of business when his source of supply is exhausted. It is elementary prudence, therefore, to look ahead and provide for the future. If he is a miner of coal, he must have coal lands; and, since coal is a much desired article, he is not only serving himself but serving the consumer also when he takes the necessary measures to prevent the supply from being exhausted or interrupted. And we are not aware that any Federal statute has declared it unlawful to lay in a large supply of raw material in order to carry on business for a considerable time. The mere size of his stock does not make a merchant an offender against the law. And especially should this be true, if in making his purchases he has acted under authority from a competent legislative body.

But after a miner raises his coal to the surface and prepares it for consumption, it is still of little value. He may use some of it himself, or may sell it to his neighbors; but this is a restricted market, and can only benefit a few. To make the best use of his product he needs many markets and many customers, for only thus can he make the most profit for himself and bring a desired article within the reach of the numerous persons that wish to use it. To accomplish these results he must of necessity use the recognized agencies of transportation, the railroad and the barge or other vessel, for only thus can he and the consumer be brought together. Now, whatever promotes this result should ordinarily be encouraged, for trade is thereby created or nourished. If, therefore, a miner should find it eco-

nomical and otherwise advantageous to build his own railroad, this of itself would seem unobjectionable and even commendable. And if he had the right to own his own railroad, as well as his own mine, there would seem to be no special objection against a sale of both to another person, or against his putting them both in the hands of the same trustees for his own benefit.

Of course, this is abstract reasoning, and we are aware that concrete and practical objections may be made to it in part; but we think it will throw light on the problem before us. In 1896 the Coal & Iron Company was the owner of a large body of coal land—the precise quantity or the proportion it bears to the whole deposit does not seem [268] to be presently important—and had been mining for years. Anticipating the future, its purchases had been beyond its present needs; but this of itself was not a violation of law, even although its holdings had come to be large. Its product was much desired by many people, and the cessation of mining would have seriously affected the industry of the country and the comfort of many households. The State of Pennsylvania had given it ample authority to buy and hold the land, and indeed no one was attempting to take the property away, or to prevent the company from using it. The mines were so situated that the only railroad it could use at all—or, at all events, could use advantageously—was the Reading Railway, and if it were shut out from this means of getting to market its customers could not obtain the coal on which they were accustomed to rely. Now (laying the Commodities Clause aside) we do not see with clearness in what the unlawfulness of the Coal & Iron Company's conduct can be said to consist. Its business, the mining of coal, was lawful; its ownership of coal lands was lawful; and its use of the Reading Railway to get to market was also lawful. The Railway and the Coal & Iron Company were not competitors; each performed its own function in putting a useful article into the hands of consumers. Although the Coal & Iron Company was a large producer of coal, and therefore a large shipper and a large seller, the size of its business was not in itself an offense. Indeed, in some aspects it may be

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regarded as a merit, for the more coal the company produced the more extensive would be its operations, thus benefiting labor and the merchants that furnish supplies to the mines, and the larger would be the quantity of coal at the consumers' command. But it is true that, while much of its conduct may have been lawful, the Coal & Iron Company and the Railway—separately or in combination—may have offended against the statute in other particulars, and, if so, they must answer for whatever misdoing has been proved.

[3] Much of the Government's complaint seems to rest on the admitted facts that the Coal & Iron Company's land holdings are large, and that the company ships and sells the largest percentage of all the coal that reaches the market. But this is not enough; before these facts can be counted as an offense under the statute, it is necessary to go further, and to show that harm has been done or is likely to be done. Who has been injured thereby, and in what manner? At this point the Government's proof appears to be insufficient. The combination complained of came into existence nearly 20 years ago, and it is certainly not without significance that the evidence of injury is so speculative and so vague. We shall speak of one or two apparently objectionable matters in a few moments; but (laying them aside and speaking generally) we may say that very little definite proof of injury has been offered. As far as we can see, only three classes of persons could be injured: (1) Rival producers on a large scale, who might be injured by unfair methods of competition; (2) smaller producers, who might suffer by similar methods; and (3) the consumer, who might suffer by extortionate prices. As to the first class, there is no evidence whatever on this subject and we have heard no argu[269]ment that unfair methods of competition have been used. As to the consumer, no effort has been made to prove that the prices of coal have been oppressive, and we cannot assume it without proof; indeed, although the bill does charge that extortionate profits have been made in mining and in carrying coal, the charge was abandoned, and the Government's brief says nothing about it. The smaller producer, however, may have some ground for complaint, and to this we shall turn our attention briefly.

The bill avers that the Holding Company became the owner of the old *Railroad's* claim against the Coal & Iron Company, and carries it as an open account upon which interest is not regularly charged and (when paid at all) is only paid at small and varying rates. Although it is denied that the debt is now the property of the Holding Company, and although there is some obscurity on this subject, we are inclined to believe that the denial is more formal than substantial. There is positive evidence to the effect that the Coal & Iron Company owes this debt to the Holding Company, and some positive evidence to the contrary; but the debt is certainly carried on the books of both companies as an open account between them, and installments of interest are certainly being paid thereon from time to time. The Holding Company's answer admits:

"That there is carried on the books of this defendant, in an open account with said Coal & Iron Company, the amount—less certain deductions—of that company's debt to the Philadelphia & Reading Railroad Company and its receivers as it stood on November 18, 1896, amounting at that time to about $69,000,000, together with the abovementioned accretion; that on account of interest, other than interest on commercial loans, it has received from the said Coal & Iron Company only the following amounts:

"In 1900	$884, 850. 18
1901	886, 504. 62
1902	888, 780. 61
1903	1, 582, 334. 41
1904	1, 582, 477. 77
1905	1, 582, 255. 21
1906	1, 583, 304. 53
1907	1, 583, 914. 05
1908	1, 584, 485. 40
1909	935, 003. 19
1910	743, 957. 87
1911	320, 000. 00
1912	810, 998. 97
1913	2, 269, 405. 15"

(But the sum of $12,000,000 paid by the Holding Company since 1896 is not to be added to the amounts that were advanced to the Coal & Iron Company by the old *Railroad* Company. This sum was used to pay prior liens on the property of the Coal & Iron Company—known as "divi-

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sional coal land bonds"—and was obtained by the sale of bonds reserved for this and other purposes under the general mortgage of January, 1897.)

In the same connection the Government avers that the old Railroad Company gave rebates of freight to the Coal & Iron Company, and that the Reading Railway is now the owner of the old Railroad's claim on this account. Moreover, the Railway is charged with giv[270]ing habitually an undue and preferential credit to the Coal & Iron Company for similar charges. The facts concerning the charge of undue credit are that weekly settlements of such rates are exacted from all shippers, with rare exceptions, and that bonds to secure payment are ordinarily required, except in the case of a few large shippers. The Coal & Iron Company, however, gives no bond, and is continually allowed credits of 30 to 90 days. Its current indebtedness for freight during the past 6 years has always approximated $1,000,000, and on this sum no interest is either charged or paid. The Government's complaint with regard to these matters is thus stated in the brief:

"These advances and accommodations extended by the Railroad Company to the Reading Coal Company constituted rebates to the [Coal] Company and unlawful discriminations against other shippers along the line of the Railroad Company, in violation of sections 2 and 3 of the act to regulate commerce [act Feb. 4, 1887, c. 104] 24 Stat. 379, 380 [Comp. St. 1913, §§ 8564, 8565]."

The charge, therefore, is that the Holding Company has inherited, and is continuing, a discrimination in rates to the prejudice of other shippers along the line of the present railway; and if this be true the remedy is not within our power, but must first be sought from the Interstate Commerce Commission, which has primary jurisdiction of such matters.

Complaint is also made against certain leases of coal lands that have been made to other producers since 1896 by the Coal & Iron Company, or by one of its subsidiaries. These leases of its own lands contain covenants requiring the lessees to ship the entire product over the Reading Railway system, or by such route as it may designate. The average annual output from these lands is said to be more than 1,300,000 tons. It is merely the compulsory feature of these covenants

that is attacked, and abstractly considered it may perhaps be objectionable. Practically the result is not likely to be considerable, for nearly all the lessees have no other railroad available; but in theory the lessees should be left free to ship as their convenience and advantage may dictate, in case other routes should be available, and if the Government thinks the subject sufficiently important, we think the compulsory feature should be canceled.

A further complaint is made because the Coal & Iron Company, both before and since 1896, has purchased coal from independent producers. These are not the 65 per cent contracts referred to in the former case, but are voluntary contracts of purchase and sale, entered into because the parties believe them to be mutually advantageous. We do not find anything objectionable therein, but in any case they have been constantly diminishing during the last 10 years, and we think are no longer (even if they ever were) a factor that need be considered.

Except as stated, no discrimination or oppression against other producers and sellers has been proved against the three Reading Companies. No dealer has been prevented from going into business, and no shipper has been prevented from shipping all he produced. The Coal Company meets competition in all the markets it reaches. Everywhere along the Reading Railway, the coal of other shippers over [271] that route meets its own coal, while at many points the Pennsylvania Railroad and the Lehigh Valley Railroad bring the product of other mines. In more distant markets, it faces the competition of all its great rivals. Neither is there any proof that the price of coal has been extortionate or unreasonable. Even in times of scarcity, there has been no exaction of higher prices, although in such a situation some of the independent producers have taken advantage of the public need. The rates of freight have remained for years substantially as they now are, and (except in the case of certain shippers over two other roads, not defendants, that reach the anthracite field) the Interstate Commerce Commission with full power of regulating the subject has not interfered with these rates. Indeed, the

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commission heard and dismissed a complaint against the reasonableness of the rates charged by the Reading Railway and other carriers at the suit of Wm. R. Hearst several years ago. Neither does the evidence support the charge of the bill that "the transportation of anthracite by railroad at the rates now and for a long time past in force has been and is enormously profitable"; and this charge is not pressed in the Government's brief. And the mining of coal during the years from 1898 to 1913, inclusive, has resulted in a profit to the Coal & Iron Company of no more than 18½ cents per ton, while its miscellaneous receipts increase its income to about 20 cents.

In our opinion, therefore, the principal charges against the three Reading Companies have not been sustained.

The Central Railroad.

[4] This brings us to the Holding Company's purchase of a controlling interest in the Central Railroad's stock. In the carriage of coal the Reading Railway and the Central Railroad are not competitors, for as has been stated they do not reach the same collieries and do not compete for the same shipments. And the conformation of the country between the coal regions and New York and Philadelphia is such that competition in carriage, even by a future extension of their lines, is practically out of the question. The coal producers on the line of one railroad cannot ship now, and are not likely to ship in the future, directly over the line of the other. They would have to reach the other line by a roundabout and indirect route that would ordinarily be inconvenient and disadvantageous. But both these railroads reach the same general field, the same general source of supply, and carry a similar article to many of the same markets; as one of the witnesses testified, "It is a competition of markets," and we shall regard the subject in that aspect. For this reason the Central Railroad should not be considered merely as a carrier, but also as the owner of nine-tenths of the stock in the Wilkes-Barre Coal Company, which is a large miner and shipper, and is an important competitor of the Coal & Iron Company. So that

the situation is this: The Holding Company, already the owner of the capital stock of the Reading Railway and of the Coal & Iron Company, became the majority stockholder in the Central Railroad Company, which owns nearly all the stock of the Wilkes-Barre Coal Company. The two railroads have been carrying the coal of these two large producers [272] to many of the same markets, where the coal has been sold in competition. These carriers transport about one-third of the total tonnage of anthracite carried by all the railroads that reach the anthracite field, and the two coal companies dispose of more than 20 per cent of all the coal taken by the market. Together they operate 45 collieries out of 276, and 5 washeries out of 51. There are about 120 other producers, marketing about 50,000,000 tons.

Upon the facts thus stated we think the union of these interests in the Holding Company is condemned by the rules laid down in the Northern Securities case, 193 U. S. 197, 24 Sup. Ct. 436, 48 L. Ed. 679; and in *U. S.* v. *Union Pac. R. R. Co.*, 226 U. S. 61, 33 Sup. Ct. 53, 57 L. Ed. 124. It must not be overlooked that the sole subject of the present suit is the interstate and foreign trade in anthracite coal, while the Reading Railway and the Central Railroad interchange a vast amount of other traffic which is of very great value to both systems. This traffic is not complained of in any particular; its importance was pointed out by Judge Lanning in the former suit, and unless the friendly and mutually advantageous alliance of the two railroads in this particular must be destroyed in order to reach an unlawful combination in another particular that would otherwise escape, we are not disposed to disturb the ownership of the Holding Company in the Central Railroad's stock. The railroads that were affected by the Northern Securities case and by the Union Pacific case differ in many respects from the roads that serve the anthracite field; and (if the Reading Railway and the Central Railroad alone were concerned) the argument of counsel that lays stress on these differences would require careful attention. But, since the real competition with which we are now concerned is in the markets, and not between the carriers, we cannot consider these two

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railroads alone. The two coal companies also must be taken into account, and in our opinion it is their union that lends most force to the Government's complaint. As we understand the facts, if the Central Railroad were divorced from the Wilkes-Barre Coal Company, the object of the bill would in this respect be substantially attained, and (as this particular matter was not argued by counsel) we suggest it for their consideration when the scope of the decree comes to be determined.

COMMODITIES CLAUSE.

[5] Since the Lehigh Navigation Company need no longer be considered, and since the Government will have no complaint against the Wilkes-Barre Coal Company if the foregoing suggestion be finally adopted, the Commodities Clause calls for attention only in its bearing upon the relation between the Reading Railway and the Coal & Iron Company.

The clause forbids a railroad company to carry in interstate commerce after May 1, 1908, any article or commodity (with certain exceptions) "manufactured, mined, or produced by it, or under its authority, or which it may own in whole or in part, or in which it may have any interest, direct or indirect." Act June 29, 1906, c. 3591, § 1, 34 Stat. 585 (Comp. St. 1913, § 8563, cl. 6). The general subject [273] has recently been discussed in *U. S. v. Del., Lack. & West. R. R.* (D. C.) 213 Fed. 240, and we shall not repeat what was there said, although we may be allowed to refer to the opinion for a summary of the litigation concerning the carriage of anthracite coal. The situation now before us is not the same as in the Lackawanna case. There the railroad owned and mined the coal, and the Government's position was that either the ownership or the interest of the railroad continued; here the Railway Company neither owns the land nor operates the mines, and the questions are (1) whether the coal is nevertheless in substance and reality mined or produced by the Railway Company or under its authority; (2) whether that company, while transporting the coal, has any interest therein, either direct or indirect.

These two questions are connected almost inseparably, and we shall make no attempt to keep them apart. On both of them the Supreme Court has already pronounced, and our only duty is to apply the rules thus laid down. They may be stated as follows: The act of 1906 does not forbid a railroad to hold stock in a manufacturing, mining, owning, or producing corporation, if such corporation be a bona fide organization. Commodities manufactured, mined, owned, or produced by such a corporation may be lawfully carried by the railroad, although the railroad be a stockholder in the producing corporation; and this is true without regard to the extent of the railroad's stock ownership, which may be a part or the whole. But—and the following prohibitions of course bear on the good faith of the relation between the two corporations, either in their original alliance, or in their subsequent management—the railroad company must not use the power given by such ownership to obliterate the distinction between the two organizations; it must not exert such power so as to commingle indistinguishably the affairs of both, and thus cause both corporations to be one for all purposes; it must not destroy the entity of the producing or owning corporation, and thus make the two virtually one. If it actually do these forbidden things, then the Commodities Clause applies and condemns as unlawful such abuse of a lawful right. But it is the abuse that is unlawful, not the mere existence of the relation or of the right growing out of the lawful ownership of stock.

And we have a clear declaration by the Supreme Court about the meaning of "any interest, direct or indirect," in the following language (213 U. S. 413, 29 Sup. Ct. 527, 53 L. Ed. 836):

"It remains to determine the nature and character of the interest embraced in the words 'in which it is interested directly or indirectly.' The contention of the Government that the clause forbids a railroad company to transport any commodity manufactured, mined, or produced, or owned in whole or in part, etc., by a bona fide corporation in which the transporting carrier holds a stock interest, however small, is based upon the assumption that such prohibition is embraced in the words we are considering. The opposing contention, however, is that interest, direct or indirect, includes only commodities in which a carrier has a legal interest, and therefore

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does not exclude the right to carry commodities which have been manufactured, mined, produced, or owned by a separate and distinct corporation, simply because the transporting carrier may be interested in the producing, etc., corporation as an owner of stock therein. If the words in question are to be taken as embracing only a legal or equitable interest in the commodities to which they refer, they cannot be held to include commodities manufactured, mined, produced, or owned, [274] etc., by a distinct corporation merely because of a stock ownership of the carrier. *Pullman Palace Car Co.* v. *Missouri Pac. R. R.*, 115 U. S. 587, 6 Sup. Ct. 194, 29 L. Ed. 499; *Conley* v. *Mathieson Alkali Works*, 190 U. S. 406, 23 Sup. Ct. 728, 47 L. Ed. 1113. And that this is well settled also in the law of Pennsylvania is not questioned. It is unnecessary to pursue the subject in more detail, since it is conceded in the argument for the Government that, if the clause embraces only a legal interest in an article or commodity, it cannot be held to include a prohibition against carrying a commodity, simply because it had been manufactured, mined, or produced, or is owned by a corporation in which the carrier is a stockholder."

With these rules to guide us, let us examine the evidence. The Government's brief asserts that the transaction in 1896 by which the three Reading Companies were brought into close alliance was "a mere subterfuge and sham." A priori, we think it unlikely that those who were responsible for so huge a transaction, involving hundreds of millions of property and affecting the fortunes of numerous investors, large and small, should risk the financial disasters sure to follow such a blunder as an attempted trick—to speak only of their intelligence and not of their character. And the evidence discloses what might be expected, namely, that anxious care was taken to obtain assurance that what was proposed was lawful. The charter of the Holding Company belongs to a class known in Pennsylvania as "omnibus" charters, which were granted by the legislatures of 40 or 50 years ago with a freedom that is now generally regarded as injudicious. They conferred numerous and extensive powers and privileges that can no longer be combined in one corporate organization. But they were granted in the undoubted exercise of lawful legislative power, and the validity of the grant cannot be questioned. Many of them have perished, but some have survived, and under them very important rights have grown up; the existence of these

charters may perhaps be regretted, but their right to exist cannot be denied. For example, the Holding Company's charter, which was granted in 1871, is exactly the same as the charter of the Pennsylvania Company granted in 1870, under which the Pennsylvania lines west of Pittsburgh are now owned and controlled. As Pennsylvania had adopted a revised constitution in 1873, it was obviously of the first importance to ascertain whether the Holding Company's charter had been affected by the article that declared invalid "all existing charters or grants of special or exclusive privileges under which a bona fide organization shall not have taken place and business commenced in good faith at the time of the adoption of this constitution." Accordingly, the question of the charter's validity and of its sufficiency for the purposes of reorganization was submitted to the opinion of 12 eminent counsel—George F. Baer, James Boyd, J. D. Campbell, Samuel Dickson, Thomas Hart, Jr., John G. Johnson, Victor Morawetz, Edward M. Paxson, Edward J. Phelps, George L. Rives, Francis Lynde Stetson, and F. W. Whitridge—who agreed in the following advice:

"In our opinion, the Reading Company can legally acquire, receive, and hold, and can mortgage and pledge, all the stocks, securities, and properties, including the capital stocks of the new Rail*way* Company and of the Coal & Iron Company; and it can keep and perform all covenants and conditions under which severally and respectively these two companies acquired their [275] properties from the purchasers. By a further increase of its capital [which was afterwards made] the Reading Company can legally issue the common and preferred stock and the bonds required by the plan of reorganization; and to secure the payment of these bonds it can lawfully pledge and mortgage the stock, securities, and properties by it so acquired."

Soon afterwards, early in January, 1897, the validity of the charter came before the attorney general of Pennsylvania, who gave the subject careful consideration, and was constrained to the conclusion—evidently against his wishes and his prepossessions—that the Commonwealth of Pennsylvania could not successfully attack the chartered rights of the Reading Company that had been exercised before January 1, 1874—"which business was of the same general character as that in which it proposes to engage for the

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purpose of controlling the stocks of the Railway Company and the Coal & Iron Company."

It is not necessary to quote from the charter. The Holding Company's powers are unusually varied and extensive, and the Government does not deny that formal and complete legislative authority exists to do the acts complained of; and the State of Pennsylvania has never contended that the company has exceeded its powers.

The Railway Company is a Pennsylvania corporation chartered in November, 1896, with the ordinary powers of a railroad. Practically all its stock is owned by the Holding Company. The Coal & Iron Company has had a continuous existence since March, 1871. Its principal object is stated to be "to purchase, sell, transport, and mine coal, and to mine and manufacture iron"; and for this purpose it has power to buy or lease "such lands as they may deem expedient." It is also empowered "to subscribe for or purchase the lands or stock of any other incorporated company in the State of Pennsylvania"; and the charter further provides that "any railroad or mining company existing under the laws of this State [may] subscribe for or purchase the stock or purchase or guarantee the bonds of the company incorporated." Practically all its stock is owned by the Holding Company.

In the summary of the bill already given we have stated in outline what property was sold under the decree of the Circuit Court in 1896, and what was done with the property afterwards. It is enough to say now that after the conveyances had all been made the Coal & Iron Company was again the owner of the coal lands and similar property; the Reading Railway was the owner of the railroad property, except the equipment; and the Holding Company owned the equipment—leasing it, however, to the Railway—and owned also the capital stocks of the other two companies, with some additional property. These acquisitions were the valuable basis of the Holding Company's stock, and with other securities the stock was distributed among the numerous persons entitled thereto under the plan of reorganization. We are not advised how many persons then acquired, or now

own, the Holding Company's stock; but the number would undoubtedly be large. Its capital is $140,000,000, divided into 2,800,000 shares, all of which have been issued, and the shares are bought and sold on the market. In March, 1914, the 50 largest stockholders—their names and holdings appear in the record—owned [276] about 1,200,000 shares, par value $60,000,000; and this leaves about 1,600,000 shares, which are distributed in varying amounts among many unnamed holders. The companies are all Pennsylvania corporations; the business of mining is carried on by the Coal & Iron Company, of course exclusively in Pennsylvania; the carrying business of the Railway proper is also conducted within the State, as it must be, and each of these corporations has confined itself to its respective business since the reorganization was completed.

Thus far it seems to us that the plan now assailed by the Government cannot be successfully attacked for lack of good faith; we regard it as an honest attempt to cope with a perplexing financial situation so as to save an exceedingly valuable property for many persons whose investments were in serious danger, and an attempt to solve difficult legal problems with scrupulous regard for the law. The charters referred to gave the undoubted right to issue the securities and to make the conveyances described, and we cannot condemn as unlawful the exercise of a lawful right for a lawful purpose.

But even a lawful right, originally used for a lawful purpose, may afterwards be used to attain an unlawful object. Although the organization of the companies may have been lawful, and although their alliance may also have been lawful, the question remains: Have they since offended? And especially, have they offended against the Commodities Clause? To be exact: Has the Reading Railway, since May, 1908, carried coal that had in substance and reality been mined or produced by it or under its authority, or which it owned in whole or in part, or in which it had any interest, direct or indirect? In our opinion, these questions must be answered in the negative, unless the long-established legal conceptions concerning corporate organization ought

not to prevail in the present case. These conceptions are so deeply rooted in the theory and practice of the law that an immense readjustment of legal rules would be necessary if the legal separateness of a corporation were to disappear and be replaced by the rights and liabilities of the individual stockholders. The theory of separate corporate entity has been of enormous value, and while it has been sometimes abused there is no doubt that industrial society is largely based upon its conspicuous features of distinct and separate existence and of limited liability. The abuses have been exceptional, and the law has not overlooked them. Where a corporation is a mere screen for an individual, or where one corporation performs a similar office for another, the device has not been allowed to stand in the way of justice and fair dealing. But we may safely say that in practically all such instances the element of fraud or bad faith is to be found, and it is certainly rare to find a situation where such an element is secure from successful attack. The cases already decided by the Supreme Court make the distinction between good faith and bad faith. In the Delaware & Hudson case the court said:

"We then construe the statute as prohibiting a railroad company engaged in interstate commerce from transporting in such commerce articles or commodities under the following circumstances and conditions:

[277] "(*a*) When the article or commodity has been manufactured, mined, or produced by a carrier, or under its authority, and at the time of transportation the carrier has not *in good faith* before the act of transportation disassociated itself from such article or commodity.

"(*b*) When the carrier owns the article or commodity to be transported in whole or in part.

"(*c*) When the carrier at the time of transportation has an interest, direct or indirect, in a legal or equitable sense, in the article or commodity, not including, therefore, articles or commodities manufactured, mined, produced or owned, etc., by *a bona fide corporation* in which the railroad company is a stockholder."

In the Lehigh Valley case the court assumed (as the form of that dispute required it to assume) that the coal company there in question was "*not* a bona fide mining company," but a mere agent and instrumentality of the railroad, and that "abuses" in the relations of the two com-

panies brought the production, shipment, and sale of the particular coal under the railroad's dominion, just as if it were the absolute owner; so that the entity of the mining company was destroyed, and the affairs of the two companies were so commingled in administration as to make the companies virtually one—a result that was declared to be an "abuse" of power.

If, then, the Government can succeed in the present case, it must offer evidence to satisfy the rules laid down by these decisions; and this brings us to consider what facts have been proved. That the law has been consciously and deliberately violated we do not believe, and decline to find. But as the act of 1906 does not make the carrier's state of mind an essential element in the offense, the question is still open whether the Reading Railway and the Coal & Iron Company (whatever their intention may have been) have in fact so conducted their affairs as to violate the law. The Government's case is subst[illegible]tially t[illegible]

The plan of reorganization was financed as follows: After the various properties of the old Reading Railroad and of the Coal & Iron Company had been purchased by Coster & Stetson under the decree of the United States court in this district, the purchasers conveyed the railroad properties to the new Reading Railway on November 16, 1896, and on November 18 the Railway transferred its capital stock of $20,000,000 to the purchasers and mortgaged the railroad properties in trust to secure $30,000,000, of which the sum of $20,000,000 was presently delivered and $10,000,000 was reserved "to be used in part payment for new acquisitions, constructions, and betterments upon the railroads and property of the Railway Company." It was contemplated that the Holding Company should advance the money for the purpose thus stated, and that the $10,000,000 of bonds last referred to should be used to reimburse the Holding Company for one-half of these advances. On November 18 the purchasers conveyed the coal lands, with other property, to the Coal & Iron Company, that company agreeing to join with the Holding Company in a general mortgage to be thereafter executed. On December 23 the purchasers

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conveyed to the Holding Company various bonds and [278] stocks, including the capital stocks of the Railway and of the Coal & Iron Company; conveying also the rolling stock and vessels formerly belonging to the old Railroad Company, with some other property. Apparently on January 1, 1897 (the agreement does not seem to be in the record), the Holding Company leased the equipment to the Railway by what is said to be the ordinary car-trust lease, under which the railway pays an annual rental. On January 5 the Holding Company and the Coal & Iron Company united in the general mortgage for $135,000,000 that has already been described; it is a blanket real estate and collateral trust mortgage covering the property of both companies.

These agreements contain many details. Their principal object is to provide and to secure the bonds and stocks that were required to satisfy the persons interested in the reorganization, to take care of the existing liens that were not disturbed, and to make provision for future needs—to these ends pledging as security practically all the property that had formerly belonged to the old Reading Railroad and to the Coal & Iron Company. About $69,000,000 of bonds under the general mortgage were reserved to pay outstanding liens of the old Railroad Company and of the Coal & Iron Company, these being liens prior to the mortgage, and $20,000,000 were reserved for new construction, betterment, and equipment upon the several railroads operated by the Reading Railway. The whole interest on the $99,000,000 of bonds that have been issued under the general mortgage has been paid by the Holding Company.

The Government draws attention also to the fact that the Holding Company cannot declare a dividend until it pays to the trustee under the general mortgage five cents for each ton of coal mined by the Coal & Iron Company if the dividend should equal or exceed that sum, or a smaller amount if the dividend should be smaller. This does not seem to be objectionable; the probable reason for the provision is that to take the coal from the ground lessens the security of the bondholders, and therefore the money payment is intended to stand in place of the coal.

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As the Holding Company owns practically all the shares of the Railway and of the Coal & Iron Company, it necessarily votes thereon and thus controls the election of their directors. Since the reorganization the three companies have had, with some exceptions, practically the same boards, and the same president, secretary, and treasurer. Since Mr. Baer's death in 1914, however, they do not have the same president. Their offices are in the same building in Philadelphia, and their annual reports are published in the same pamphlet. What the situation is in recent years with reference to the payment of salaries does not appear to be shown fully by the record, but we suppose it likely that in some instances the salary may be apportioned. Where services are performed for more than one company—for example, in the case of counsel or the purchasing agent—we can see no objection to such a division of salary.

These are the matters upon which the Government chiefly relies [279] as tending to support the argument that an identity exists in organization and administration, and as leading to the conclusion that the Holding Company's relation to the other two companies represents "a deliberate attempt to avoid the principle of public policy then contained in the constitution of Pennsylvania and now embodied in the Commodities Clause." The attitude of the Government also appears in the following paragraph:

"In the present case the transactions between the Reading Companies did not begin and never have been carried on in good faith, but, on the contrary, with the purpose and result of retaining in the fullest degree the substantial identity of the transporting company and of the producing company by a merely colorable change of form."

We have already said that we are unable to find bad faith or deliberate wrong-doing. But the facts relied on by the Government are pertinent and relevant to the inquiry, whether there has in fact been a violation of the Commodities Clause, whatever the intention of the parties may have been, and in this aspect they have received careful consideration. In our opinion they do not adequately describe the situation. The following additional facts must also be taken into account:

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Neither corporation owns a single share of stock in the other, and neither has any title or interest, legal or equitable, in the real and personal property owned by the other. This separation in legal contemplation is reinforced by a separation of corporate activity; each keeps to its own affairs and does not meddle with the business of the other. The Railway has not discriminated in favor of the Coal & Iron Company, either in the distribution of cars or in the use of other facilities of transportation, and since 1897 at least, no shipper has complained that the Coal & Iron Company was receiving any undue advantage. Indeed, its employés do not even ride free over the railroad, which charges and receives the usual fares for their transportation. When rights of way or other forms of occupying lands are in question, the Railway deals with the Coal & Iron Company at arm's length, as with other persons, making and carrying out contracts in the same way. The Railway buys much of its fuel coal from the Coal & Iron Company and pays in cash the regular price therefor; the quantity has ranged from 2,000,000 tons in 1898 to about 3,500,000 in recent years. And the Coal & Iron Company pays the regular tariff rates on all its coal transported by the Railway in cars or barges. During the period from 1907 to 1912, inclusive, the amount thus paid has been as much as $10,500,000, and was in no year less than $7,500,000.

The operative management of the two corporations is distinct. The Coal & Iron Company employs 25,000 men, and pays them with its own money and by its own paymaster. It buys its own materials, acting independently in the purchase thereof, and paying the cost out of its own funds. It keeps its own separate books and its separate bank account. In 1913 the cost of its mining operations was $26,000,000, and the coal produced thereby was sold for $30,000,000. It [280] makes its own prices on the coal it sells. The executive departments of the two companies are distinct in important particulars. For example, the Coal & Iron Company has its own general selling agent, who has charge of the coal sales, and has a staff of 25 to 50 men under him. It has sales agencies in eight of the principal cities of the country, with

traveling salesmen and solicitors, who sell coal over the eastern third of the country from Winnipeg to Galveston. From 12 to 14 per cent of its product is sold in the West and Middle West, although the principal markets are the State of Pennsylvania and tidewater at Philadelphia and New York. Other executive offices are also distinct. The general freight-traffic manager of the Railway, who is also a vice president, has been connected with the company for 40 years, and testified that during that period he had had no connection whatever with the Coal & Iron Company. And the general manager of the Railway, also a vice president, gave similar testimony, covering the period since 1897, to which may be added the testimony of the gentleman who is now the president of the Railway, and the testimony of the Railway's comptroller. During the last 10 or 12 years the Coal & Iron Company has spent $1,000,000 a year in carrying out its policy of developing and improving its collieries. The Coal & Iron Company pays 4 per cent interest on commercial loans made to it from time to time by the Holding Company.

The assets of the Coal & Iron Company are distinct from the assets of the Railway Company, and in 1912 amounted to more than $86,000,000. Of this total the coal lands furnished $50,000,000; yards in various parts of the country, owned by the Coal & Iron Company, furnished $2,500,000; shops at Pottsville, in the Schuylkill region, furnished $400,000; storage yards and washeries, $850,000; and the improvements and equipment at its collieries, $13,000,000.

The facts point to a separation in fact as well as in legal theory, and bring the situation well within the decision in the *Del. & Lack. case* (D. C.) 213 Fed. 240. It is true that this decree has recently (June 21, 1915) been reversed by the Supreme Court (238 U. S. 516, 35 Sup. Ct. 873, 59 L. Ed. 1438), but solely for a reason that does not rule the questions now presented for decision. As already stated, the Lackawanna Railroad was the owner and miner of the coal, and by an agreement with the Lackawanna Coal Company undertook to divest itself of title and interest before the carriage of the coal began. Upon the construction of this agreement the decision turned in the Supreme

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Court, and after its meaning and effect had been ascertained, and the court had determined that it did not divest the railroad's interest in the coal, nothing remained but to apply the Commodities Clause to a situation that was embraced within the scope of its language. The following quotation from the opinion will sufficiently indicate that the question regarded by the court as controlling was the construction of that agreement:

"1. But mere stock ownership by a railroad, or by its stockholders, in a producing company cannot be used as a test by which to determine the legality of the transportation of such company's coal by the interstate carrier. For, when the Commodity Clause was under discussion attention was called to [281] the fact that there were a number of the anthracite roads which at that time owned stock in coal companies. An amendment was then offered which, if adopted, would have made it unlawful for any such road to transport coal belonging to such company. The amendment, however, was voted down; and, in the light of that indication of congressional intent, the Commodity Clause was construed to mean that it was not necessarily unlawful for a railroad company to transport coal belonging to a corporation in which the road held stock. *United States* v. *Delaware & Hudson Co.*, 213 U. S. 414, 29 Sup. Ct. 527, 53 L. Ed. 836. For a stronger reason, it would not necessarily be illegal for the road to transport coal belonging to a corporation whose stock was held by those who owned the stock of the railroad company.

"Nevertheless, the Commodity Clause of the Hepburn Act of 1906 rendered unlawful many transactions which prior to that time had been expressly authorized by the statutes of the States which had chartered the coal roads. And, while the Hepburn Act provided that, in the future, interstate railroads should not occupy the dual position of carrier and shipper, there was, of course, no intent on the part of Congress to confiscate property or to destroy the interest of the stockholders. But still, upon adoption of the Commodity Clause, this appellee railroad was confronted with a difficult situation. To shut down the mines, because the coal could not be transported, would have meant, not only a vast monetary loss to the company and its stockholders, but would have been even more harmful to the interests of the public, which required a constant supply of fuel. The character of coal property was such as to make it impossible to divide the same in kind among the railroad stockholders, while the value of the coal land was so great as to make it impracticable to find a purchaser in ordinary course of trade. It was therefore natural, if not necessary, to organize a corporation with which a contract could be made, and out of cash received or stock issued to pay for or preserve the equity which the railroad shareholders had in the coal.

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"In this situation there may have been no impropriety in the Railroad Company taking the preliminary steps of organizing such a corporation. Neither was it illegal for the stockholders of the Railroad Company to take stock in the Coal Company, for there are many instances in which the law recognizes that there may be diversity of corporate interest, even when there is an identity of corporate members. A city and the county, in which it is located, may both have the same population but different corporate interests. Many private corporations have both stockholders and officers in common, yet they may nevertheless make contracts which will bind both of the separate entities. But whenever two such companies, thus owned or managed, make contracts which affect the interest of minority stockholders, or of third persons, or of the public, the fact of their unity of management must be considered in testing the validity and bona fides of the contracts under review.

"2. That principle is to be specially borne in mind in the present case. For this is not an instance of a coal road and a coal company, both of which existed and had made contracts prior to the Commodity Clause; but a case where a coal company was created with the express purpose that, with stockholders in common, it should be a party to a contract intended to enable the Railroad Company to meet the requirements of the Commodity Clause and at the same time continue the business of buying, mining, selling, and transporting coal.

"It is also to be noted that the Delaware, Lackawanna & Western Railroad Company did not part with title to its coal lands, mines, and mining machinery, as seems to have been done, on terms not fully stated (*United States* v. *Delaware & Hudson*, 213 U. S. 366, 398 [5], 29 Sup. Ct. 527, 53 L. Ed. 836), in some of the instances discussed in the Commodity cases. In them the ownership of the mines had passed completely from the railroads to the producing companies, and the coal property was no longer subject to the debts of the railroad companies. After such sale of the coal lands there was both a technical and a practical separation of the legal interest of the two corporations in the coal under the ground, on the surface, when it was transported, and when it was sold. The fact that the railroad held stock in the producing [282] company, and received dividends thereon, did not give to the Railroad Company, any more than to any other stockholder in any other corporation, a legal interest in the property of the Coal Company. Nor would the fact that the Railroad Company had once owned it have made any difference, if, by a normal and bona fide sale at the point of production, the carrier had lost all power of control and all right, title, and interest in the coal before the transportation began. *United States* v. *Delaware & Hudson*, 213 U. S. 413, top, 29 Sup. Ct. 527, 53 L. Ed. 836.

"3. But the decisions construing the statute recognize that one corporation can be an agent for another corporation, and that by means of stock ownership one of such companies may be converted

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into a mere agent or instrumentality of the other. *United States* v. *Lehigh Valley R. R.*, 220 U. S. 257, 273, 31 Sup. Ct. 387, 55 L. Ed. 458. And this use of one by the other, or this power of one over the other, does not depend upon control by virtue of the fact that stock therein is held by the Railroad Company or by its shareholders. For dominance of the Coal Company may be secured by a carrier (*New Haven R. R.* v. *I. C. C.*, 200 U. S. 363, 26 Sup. Ct. 272, 50 L. Ed. 515) not only by an express contract of agency, but by any contract which in its practical operation gives to the Railroad Company a control or an 'interest, direct or indirect,' in the coal sold, at the mouth of the mines.

"Assuming, then, that the incorporation and organization of the Coal Company under the auspices of the Railroad Company was legal; assuming that the election of railroad officers as the first managers of the Coal Company was not illegal; assuming that as officers of the Railroad Company they could contract with themselves as officers of the Coal Company; assuming that at the time of organization it was not unlawful for the Railroad Company and the Coal Company not only to have officers but offices in common; and, finally, assuming that all these facts together did not in and of themselves establish an identity of corporate interest, still these facts, taken together, are most significant. They at least prove that the relation between the parties was so friendly that they were not trading at arm's length. And the further fact that one of the parties was under a statutory disability as to hauling coal makes it necessary to carefully scrutinize their arrangement in order to determine whether it was a bona fide and lawful contract of sale, or a means by which the railroad, though parting with the legal title, retained an interest and control in what had been sold."

Since the court did not discuss the constitutional questions referred to as "grave" questions by the opinion in *U. S.* v. *Delaware & Hudson Co.*, 213 U. S. 367, 29 Sup. Ct. 527, 53 L. Ed. 836, it is clear that these were not regarded as necessary to the decision of the Lackawanna case. Of course, these questions are not presented by this record either, if the conclusion we have reached is correct; whether they are presented in case that conclusion should be wrong, must be decided, not by us, but by the ultimate tribunal. The essential difference between the Lackawanna case and this, as we have pointed out above, is that here there has been no change or attempted change of ownership or interest in the coal—the Railway has never owned it, or had any legal interest therein—and the questions presented appear to be those already referred to at the beginning of the discussion on

this branch of the case. Following the authoritative decisions of the Supreme Court on this subject, we are of opinion that the Commodities Clause has not been violated by the Reading Companies.

We regret the delay in the decision of this very important dispute, but, while the Lackawanna case was pending in the Supreme Court, it seemed desirable, and, indeed, almost imperative, to await the result in that tribunal. And we regret the length to which this discussion has extended; with every desire to shorten it, the need of stating the [283] case fully, in order to facilitate the review that will follow, has operated to prolong the examination—we can only hope, not unduly.

A decree may be prepared in accordance with this opinion.

SUPPLEMENTAL OPINION.

PER CURIAM.

As the parties have not been able to agree in all respects concerning the terms of the proposed decree, this memorandum may perhaps be useful.

1. They do not agree upon the question whether the charge in the bill, that the Central Railroad Company is violating the Commodities Clause by transporting the coal of the Lehigh & Wilkes-Barre Coal Company, should be unreservedly dismissed, or should be dismissed without prejudice. The position of the Railroad Company is that the charge should be unreservedly dismissed because the question is already res judicata. The facts to support the argument are these:

A similar charge was made against the Railroad Company in June, 1908, by a bill filed in the group of actions known as the First Commodities cases. In the Circuit Court all the cases were submitted on bill and answer, accompanied by a stipulation that such "submission on bill and answer, and any averment or admission in the pleading of either party contained, shall in nowise prejudice the said parties in any other suit or proceeding heretofore or hereafter instituted, and shall be operative and take effect only with respect to the present suit and for the purposes thereof." The decrees

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of the Circuit Court dismissing the bills were entered in October, 1908, and in May, 1909, the Supreme Court reversed them and remanded the cases for further proceedings. *United States* v. *Delaware & Hudson Co. et al.*, 213 U. S. 366, 29 Sup. Ct. 527, 53 L. Ed. 836. In March, 1910, the Circuit Court reinstated the suit against the Central Railroad Company, and the Government moved for a decree that the bill be dismissed "without prejudice." This motion was head upon the identical bill, answer, and stipulation that had previously been considered, and the Circuit Court was of opinion that the record did not show that the Railroad Company was violating the Commodities Clause as construed by the Supreme Court. The Government's motion was therefore denied, and, after the Attorney General had declared that, in view of such denial he did not intend to proceed further in the Circuit Court, a second decree was entered dismissing the bill without qualification. The case was again taken to the Supreme Court, and the decree was affirmed. *United States* v. *Erie R. R. Co. et al.*, 220 U. S. 275, 31 Sup. Ct. 392, 55 L. Ed. 464. The Supreme Court pointed out that the Government had made no offer in the Circuit Court to show any further facts, and had not withdrawn the stipulation to submit the cause on bill and answer; saying that, as "leave to amend was not asked, and as upon the facts appearing and admitted on [the] record no violation of the Commodities Clause was shown, the decree entered may properly be held to have been in strict conformity with the opinion of this court."

This, of course, is an unequivocal declaration that upon the facts set forth by the bill and answer in that cause no violation of the Com[284]modities Clause had been shown; and (if there were nothing else) the Central Railroad would no doubt be entitled to such protection as might properly be afforded in such a situation. But the bill and answer were only a part of the record; the stipulation formed the other part, and of this the Supreme Court also took notice, as the following remark will show:

"Whatever, therefore, in view of the stipulation made below, may be the scope and effect of the decree as res judicata, we see no reason for concluding that error was committed by the Circuit Court in refusing to qualify its decree."

This decision was made in April, 1911 (*United States* v. *Erie R. Co.*, 220 U. S. 275, 31 Sup. Ct. 392, 55 L. Ed. 464), and the suit before us was brought in September, 1913.

In the present action the charge of violating the Commodities Clause is brought against the Central Railroad Company for the second time, and upon the merits of that dispute we have not felt bound to pass. The obvious reason is that, if the Central Railroad Company were divorced from the Lehigh & Wilkes-Barre Coal Company, the question would cease to be important. Such a separation is provided for in the decree about to be entered, and therefore, whether the question be res judicata or not, the charge in the bill may properly be dismissed. But as we have not passed upon the merits, and are dismissing the charge for a different reason, we decline to consider now the question whether the Supreme Court finally settled the dispute in 1911. For the present the effect of that decision will be left undetermined. We can not foresee the future; the situation may so change hereafter as to justify the Government in raising the question again, and in that event the effect of the Supreme Court's ruling may then be presented for decision.

For the reason, therefore, that we have not passed upon the merits, we think the dismissal of the charge should not affect the Government's right to proceed hereafter in case it shall be so advised. But we wish it to be understood, also, that in like manner our decree leaves unaffected the right of the Central Railroad Company to set up the defense of res adjudicata in such subsequent proceeding.

2. Neither do the parties agree completely about the method of dissolving the unlawful combination between the two coal companies. The Central Railroad Company asks us to consider the alternative proposition—that we should require the Reading Company to dispose of its stock in the Central, instead of requiring the Central to dispose of its interest in the Lehigh & Wilkes-Barre Coal Company. Undoubtedly some reasons exist in favor of such a course, but, on the whole, the other method seems to be preferable.

3. We agree with the Government that the separation of interest between the Central Railroad Company and the

Lehigh & Wilkes-Barre Coal Company should be effective, and to that end we think the bonds and other securities, as well as the stock, of the Coal Company should be disposed of.

4. And to the same end we think the Central Railroad Company should be enjoined (for the present at least) from compelling the Coal [285] Company to send its coal over the lines of the Railroad. As long as the union of interest between these two companies exists, this provision seems to be necessary.

5. We are not disposed to accept the Government's suggestion to ask for the help of the Federal Trade Commission. We are unable to see any advantage in turning this matter over to the commission, instead of dealing directly with it ourselves. The defendants can present their plan, as has been done in other cases, and we can then consider it in the light of such objections as may be made to it by any interest affected thereby, and can afterwards determine finally what course to adopt.

The principal matter in dispute is whether the individual stockholders of the Central Railroad Company (distinguishing them from the Reading Company and the other corporations defendant) should be permitted to acquire the stock, bonds, and other securities of the Coal Company, and on this point, also, we agree with the Government. In our opinion the doctrine of the *Union Pacific case*, 226 U. S. 470, 33 Sup. Ct. 162, 57 L. Ed. 306, calls upon us to deny the individual stockholders that privilege.

In accordance with the foregoing views the following decree will be entered:

FINAL DECREE.

This cause having come on for final hearing upon pleadings and proofs, and having been argued by counsel before three circuit judges, sitting under the provisions of the Expediting act of February 11, 1903 (32 Stat. 823, c. 544, § 1), as amended by act June 25, 1910, c. 428, 36 Stat. 854 (Comp. St. 1913, § 8824), and the pleadings, proofs, and arguments having been considered, and the opinion of the court having

been filed, it is now, this ——— day of ———, 1915, ordered, adjudged, and decreed:

1. Except as hereinafter provided, the bill, or petition, is dismissed.

2. The charge therein contained—namely, that the lease of the Lehigh & Susquehanna Railroad made between the Lehigh Coal & Navigation Company and the Central Railroad Company of New Jersey, contained in the writings dated, respectively, March 31, 1871, May 27, 1883, and June 28, 1887, is in violation of the Anti-Trust Act of July 2, 1890 (26 Stat. 209, c. 647)—is not sustained, and in respect thereof the petition is dismissed. But in respect of all other charges against the Lehigh Coal & Navigation Company, and in respect of all charges against the Lehigh & New England Railroad Company, and the Lehigh & Hudson River Railway Company, the petition is dismissed without prejudice.

3. The charge that the Central Railroad Company is violating the Commodities Clause of the act to regulate commerce (act June 29, 1906, c. 3591, § 1, 34 Stat. 585 [Comp. St. 1913, § 8563]), is dismissed, but without prejudice.

4. The union of the Philadelphia & Reading Coal & Iron Company and the Lehigh & Wilkes-Barre Coal Company, through the instrumentality of the Reading Company, a holding corporation—which owns the entire capital stock of the Philadelphia & Reading [286] Coal & Iron Company and a majority of the capital stock of the Central Railroad Company, the last-named company owning in turn a majority of the capital stock of the Lehigh & Wilkes-Barre Coal Company—is a combination in restraint of trade and violates the Anti-Trust Act of July 2, 1890 (26 Stat. 209, c. 647).

5. Within ——— days from the entry of this decree—or, in case an appeal be taken therefrom to the Supreme Court of the United States and duly prosecuted, then within ——— days after the filing in this court of the mandate of the Supreme Court affirming the decree—the defendants shall submit to this court a plan for the disposal by the Central Railroad Company of all the stock, bonds, or other securi-

ties of the Lehigh & Wilkes-Barre Coal Company now owned or in any manner controlled by it; the plan to be such as will effectually dissolve the unlawful combination and create a situation in harmony with law. If the defendants shall fail to present a plan within the period stated, or if the plan submitted shall be rejected, this court will take such further steps, by receivership or otherwise, as may then seem necessary, to dispose of the stock, bonds, and securities referred to, and to dissolve effectually the unlawful combination, so as to create a situation in harmony with law. For this purpose the court retains jurisdiction of the cause.

6. Pending the disposal of the stock, bonds, and securities referred to, the Central Railroad Company, the Reading Company, and all corporations controlled by them, or either of them, or subject to a common control with them, or either of them, through stock ownership or otherwise, their officers, directors, agents, and employés, are hereby enjoined from voting or attempting to vote on any stock of the Lehigh & Wilkes-Barre Coal Company, from collecting or receiving any dividends or interest upon its stock, bonds, or other securities, and from exercising or attempting to exercise any control, direction, supervision, or influence whatever over its acts, either by proxies from other stockholders or otherwise. And the Central Railroad Company, the Reading Company, and all corporations controlled by them, or either of them, or subject to a common control with them, or either of them, through stock ownership or otherwise, their officers, directors, agents, and employés, are perpetually enjoined from hereafter acquiring, directly or indirectly, any interest in or control over the stock, bonds, or other securities of the Lehigh & Wilkes-Barre Coal Company, or any control over said company. And the Central Railroad Company is hereby enjoined from requiring, or attempting or threatening to require, the Lehigh & Wilkes-Barre Coal Company or any of its subsidiary companies to ship all or any part of their coal tonnage over any railroad or line of transportation operated or designated by the Central Railroad Company.

7. All clauses, stipulations, or covenants in leases of coal lands made by the Philadelphia & Reading Coal & Iron

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Company, or by the Lehigh & Wilkes-Barre Coal Company, or by any company subsidiary to or controlled by either, that require, or purport to require, the lessees to ship coal over any particular railroad or railroads, or over such route as may be designated by any railroad or companies, are hereby declared [287] to violate the Anti-Trust Act of July 2, 1890, and therefore to be void; and the coal companies and the railroad companies that are parties to this decree, their officers, directors, agents, and employés, are hereby enjoined from enforcing, or attempting to enforce, or threatening to enforce, such clauses, stipulations, or covenants.

8. The Government is entitled to recover from the Reading Company so much of its taxable costs in the district court as relate to the subject matter of the fourth, fifth, and seventh sections of this decree.

FREY & SON, INC., *v.* CUDAHY PACKING CO.[a]

(District Court, D. Maryland. December 9, 1915.)

[228 Fed. Rep. 209.]

COURTS 274—ANTI-TRUST ACTS—SUIT AGAINST CORPORATION FOR VIOLATION—DISTRICT OF SUIT.—Clayton Anti-Trust Act Oct. 15, 1914, c. 323, §§ 4, 12, 38 Stat. 731, 736, in providing that a suit for violation of the Anti-Trust laws may be brought in any district in which the defendant resides, or is found, or has an agent, and that if a corporation suit may be brought not only in the district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business, and that in such cases process may be served in the district of which it is an inhabitant, does not authorize a suit against a corporation in any district in which an agent may be found, unless he is there in his representative capacity, and the defendant is more or less regularly, through him, transacting business therein.[b]

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 814; Dec. Dig. 274.]

COURTS 274—ANTI-TRUST ACTS—SUIT AGAINST CORPORATION FOR VIOLATION—DISTRICT OF SUIT—TRANSACTING BUSINESS IN DISTRICT.—Defendant, a foreign packing company, had agents soliciting orders for its products in Maryland, chiefly from jobbing houses, and for the purpose of promptly filling such orders kept a supply of its goods with a storage company, which delivered the same on

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[a] For later opinion (232 Fed. 640) see *post*, page 383.

[b] Syllabus copyrighted, 1916, by West Publishing Company.

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orders from defendant's officers in other States. *Held,* that defendant was transacting business in Maryland, within the meaning of Clayton Anti-Trust Act Oct. 15, 1914, c. 323, § 12, 38 Stat. 736, that a suit for a violation of the Anti-Trust laws could be maintained against it in that district, and that it might be brought into court by process served upon it in the State of its incorporation, as provided in said section.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 814; Dec. Dig. 274.]

At Law. Action by Frey & Son, Incorporated, against the Cudahy Packing Company. On motion to quash return of service. Denied.

Horace T. Smith, of Baltimore, Md., and *Daniel W. Baker*, of Washington, D. C., for plaintiff.

Washington Bowie, jr., of Baltimore, Md., and *Gilbert H. Montague*, of New York City, for defendant.

Rose, district judge.

The plaintiff is a Maryland corporation, carrying on business in the city of Baltimore. It claims that the defendant has, by doing a thing forbidden by the Anti-Trust laws of the United States, injured it in its business. To recover for the damage so brought about this suit was instituted.

[1] The defendant is an Illinois corporation. It appears specially for the sole purpose of moving to quash the marshal's return of service. It says that (1) it is not liable to suit in this district, because it neither resides, is found, transacts business, or has an agent herein; and (2) if liable herein, it can not be brought into court by service upon the individuals actually served by the marshal.

The first contention alone raises any vital issue. It is true that there are high authorities for the rule that a nonresident corporation can ordinarily be sued only (1) in the district in which it is carrying [210] on business; (2) by service upon some agent or officer appointed by and representing it; and (3) in which some State law makes it amenable to suit as a condition of doing business therein. *United States* v. *American Bell Telephone Co.* (C. C.) 29 Fed. 17.

The third of these requirements is obviously inapplicable here. This is a suit brought in a Federal court, to recover for a wrong done in contravention of a Federal law, which law specifies the district in which such suit may be prosecuted.

Nor in this case is the second of much greater real importance. Ordinarily, process either of a State court or of a District Court of the United States can not be served beyond the territorial limits of the State or of the district, as the case may be. A non-resident corporation may be doing business in a district, and therefore theoretically be liable to suit therein; but if it is not represented therein by an agent, upon whom process against it may be legally served, it can not, against its will, be brought into court. The framers of the Clayton Act, however, have taken care that suits authorized by it shall not be so obstructed. The twelfth section of that statute provides for the bringing of a corporation into the court of any district in which, under that act, it may be sued, by service of process upon it in any district of which it is an inhabitant, or wherein it may be found. If the defendant is properly suable in this district, the objection to the representative character of the so-called agent, upon whom the process herein was served, would not end the suit here. It could have no other effect than to delay the progress of the case until process could be served upon the defendant in the district of which it is an inhabitant.

The first requirement remains of binding force, except in so far as, if at all, it has been modified by the provisions of the Clayton Act. The fourth section of that act provides that such suit as this may be brought in the district in which the defendant resides, or is found, or has an agent, and section 12, that such suit, when against a corporation, may be brought, not only in the judicial district in which it is an inhabitant, but also in any district wherein it may be found or transacts business.

Plaintiff contends that both these sections are applicable to corporate defendants, although section 12 obviously has nothing to do with non-corporate. Assuming, without deciding, that defendant's contention in this respect is sound, there is nothing in the history of this legislation, or of the needs,

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or supposed needs, which gave rise to it, to suggest that Congress intended to say that a defendant corporation could be sued in any district in which an agent of it happened to be on business other than its own. Clearer language than that used would be required to show that Congress intended to change the rule that an officer, agent, or employee of a corporation can not carry it into any jurisdiction in which he is not acting for it. But, when he is so acting, the corporation is, through him, doing something there, and, if it is through him regularly doing something, it is in the broadest sense, at least, doing business.

The language used, viz, "has an agent residing," does not suggest that the mere casual presence of an agent would be sufficient. It seems as [211] if Congress in using it had in mind those cases which have held that a corporation is not doing business generally in a district unless it is there carrying on a fairly continuous series of transactions. Into many of these questions it is not here necessary to go.

Congress doubtless meant to facilitate the redress of wrongs done in violation of the Anti-Trust Acts. It wanted to let a plaintiff sue wherever it was most convenient to him, provided injustice was not thereby done a defendant. The provision in section 12, for serving process in another district from that in which the suit was instituted, itself took out of a plaintiff's way most, if not all, the purely technical obstacles which had formerly obstructed it. Congress, in designating the district in which the suit against a corporation might be brought, did not materially, if at all, change the rule which had been laid down in a long line of well-considered cases. Probably in the nature of things it could not. The intangible thing, a corporate aggregate, can fairly be supposed to be always found in the State which gave it being. It may, without obvious unfairness, be made suable wherever it chooses to carry on some part of its business. But it can not be said to be anywhere else. Persons connected with it may be; but, if it is not acting through them at the time, they can not carry it with them. But, so far as corporate defendants are concerned, does not the act go as far as there is any reason anyone should want it to go?

A corporation may be sued under this statute where it transacts business. It can not escape the obligation to respond because no agent of it, of the rank and character qualified to be served for it, can be there found. Suit may be there brought and process may issue to a district in which it can not deny its liability to service.

The act so construed will for practical purposes usually make it unimportant to consider, in connection with liability to suit and to service, any question except whether the defendant is doing or transacting business in a particular district, for, unless it is, it can not possibly have any agent who, as agent, is therein.

[2] Last May, when this suit was brought, was the defendant doing business in this district? The relevant facts are not in dispute. For some years previous it had a number of customers in this State. Most of these were jobbers, handling wholesale groceries and like goods. They bought defendant's products for the purpose of reselling them to retailers in the ordinary course of business. For some reason or other it preferred to call them "distributing agents." In some instances defendant sold some of its products directly to ultimate consumers. They were usually institutions or owners of large buildings, who bought in fairly considerable quantities. It had drummers, who regularly visited the jobbing trade in order to secure orders for its wares.

As is the usual business custom, when these orders were received at one or the other of defendant's principal offices outside of Maryland, it reserved to itself the right of accepting or rejecting them. It further stimulated a demand for certain of its products by sending an agent to the retail grocers. It was his business to show how the appearance of the corner grocery could be made more attractive by displaying the advertising matter which the defendant was ready to furnish to those [212] who kept its "Old Dutch Cleanser" for sale. If this agent was able to interest the grocer, he would ask him with what jobber he dealt, and if one who handled defendant's goods was named the agent would get an order from the grocer on such jobber for as much of defendant's goods as the grocer could be induced to

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buy. Whether the order was or was not filled, of course, rested with the jobber. In these ways, in addition doubtless to the usual advertising through the mails and otherwise, the defendant sought here to create and maintain a demand for its wares.

To facilitate the supply of that demand, when the goods were, as usual, called for in less than carload lots, and for the purpose of rendering easier the work of its retail demonstrator, it had, some years ago, entered into an arrangement with the Fidelity Warehouse Company. The latter operates several large warehouses in this city. As such arrangement worked out in actual practice, the defendant kept always at such warehouses a stock of its goods, the value of which at any one time might be as much as $10,000. These goods were shipped in carload lots to the Warehouse Company, which unloaded them from the car and stored them. Upon orders from the defendant, sent from one of its officers outside the district, the Warehouse Company would deliver cases of these goods to persons to whom the defendant, upon the orders in part secured by its drummers, had sold them, or it would, upon like orders, ship portions of them by rail or water in intra or inter state commerce. The Warehouse Company itself made no sales. The contract between it and the defendant provided for the collection in some cases of money due on goods sold C. O. D.; but in point of fact such transactions were so extremely rare as to be almost unknown. It was authorized to deliver goods up to a certain aggregate quantity to certain named customers of the defendant, upon the request of such customers and without receiving any specific authority so to do from the defendant. Such customers were, however, seldom or never dealers, but were the large ultimate consumers before mentioned. Moreover, the defendant kept at the warehouses quantities of its advertising matter, which were used by its demonstrator in decorating retail grocery stores.

For its services the Warehouse Company was compensated by certain agreed storage and hauling charges. Under the circumstances, was the defendant doing business in Maryland? Many cases have been referred to by one or the other

party. It is believed all have been examined. A great many of them are beside the question here to be passed on. Quite a number turn, not so much upon whether a non-resident corporation or individual is doing business of some kind in a particular State, as upon whether what the State has done, or attempted to do, amounts to a direct burden upon interstate commerce. As, for example, there is no question that, in transporting interstate freight into, out of, or through a State, the carrier transacts business therein; but it is not business upon which a State can impose a direct burden.

Other cases cited have their origin in State statutes, which prohibit a non-resident corporation doing business in the State, suing in the State [213] courts, unless it has complied with certain requirements as to the appointment of agents, etc. Here the courts are disposed to construe the phrase "doing business" in the light of the policy which dictated such enactments.

As the Supreme Court itself has pointed out, it is not possible, in cases in which the sole issue involved is the liability of a non-resident corporation to be sued, to formulate any general rule of universal application. Each of such cases must depend upon its own facts. *International Harvester Co.* v. *Kentucky*, 234 U. S. 579, 583, 34 Sup. Ct. 944, 58 L. Ed. 1479. Whether a non-resident corporation is doing business specially, so as to subject it to suit at the instance of a particular defendant, may depend in part upon the relation of the things it is doing to the cause of action asserted. *Mutual Life Insurance Co.* v. *Spratley*, 172 U. S. 602, 618, 19 Sup. Ct. 308, 43 L. Ed. 569.

In the case at bar the gravamen of the plaintiff's declaration is that the defendant, in order to coerce it to become a party to an alleged agreement, which was to be carried out chiefly in Maryland, refused to sell to plaintiff its goods; that is to say, refused, for this alleged illegal purpose, to let plaintiff share in any of the facilities, to furnish which was the purpose of the business activities, which, as before set forth, the defendant carried on in Maryland, or caused others to carry on for it. There is no reason under such circumstances to interpret the phrase "doing or transacting

business" as if it was a term of an art or a mystery. The average man, whether intelligent or unintelligent, would suppose that a concern which kept steadily on hand in Maryland perhaps $10,000 of goods to facilitate their prompt delivery to numerous customers in that and neighboring States, so soon as the company at one of its outside offices had accepted offers which it kept men busy in Maryland soliciting, was doing business in the State. Whatever may sometimes be the case, there is no occasion here to assume that the reason of the law is not a man's natural reason.

It follows that, when this suit was instituted, the defendant was doing business in this district, within the meaning of the Clayton Act. The defendant says, nevertheless, that the return should be quashed because served upon persons who were not its agents of a character or rank upon whom such service could lawfully be made. Such an issue may often be delicate and difficult. A corporate defendant who is enough in the State or district there to wrong some one should be held to be enough in the State or district to be there answerable for what it has there wrought, provided such holding can be made without giving sanction to practices which in other cases would work injustice. On the other hand, no corporate defendant should be compulsorily brought into court by service upon one who, although connected with it in some sense, bears no such relation to it as to make it fair to presume that either it or any other reasonable and prudent person in like case would care to run the risk of being served by service upon him.

To subject the non-resident to suit in favor of the resident is often, although not always, a result which may justly be thought desirable. [214] State legislation and State decisions show how the anxiety to attain that end has led to holding good the service of process upon so-called agents, who have little connection with, responsibility to, or concern for the absent defendant. On the other hand, to insure, so far as is humanly possible so to do, that no one shall be judged without having a real opportunity to be heard, is perhaps the most fundamental of all the rights involved in due process of law.

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In suits under the Clayton Act is there any reason even to attempt a solution of such problems, or to make decisions which in some other cases may lead to injustice? Provided the defendant is suable at all in the district, why not see to it that it shall be summoned in a way to which no possible objections can be made, and which cannot create a dangerous precedent. Whenever upon grounds not obviously frivolous the question is raised as to the authority of the agent upon whom process was served, why cannot the court suspend its answer until the plaintiff has had due process served, as the Clayton Act authorizes, in the home district of the defendant, upon some of its officers whose right to accept service for it cannot be gainsaid. When such service has been made, the question as to whether the earlier one was or was not good will have become so purely academic that there will seldom be an occasion to answer it at all.

Such course will be followed in this case, provided plaintiff acts with reasonable diligence in causing process to be served upon the defendant in the district of its residence.

FREY & SON, INC., v. CUDAHY PACKING CO.[a]

(District Court, D. Maryland. April 27, 1916.)

[232 Fed. Rep. 640.]

MONOPOLIES 28—PRICE DISCRIMINATION—ACTION FOR DAMAGES—JURISDICTION.—An action may sometimes be maintained in a Federal District Court to recover damages for alleged price discriminations by defendant against plaintiff in violation of Clayton Act, Oct. 15, 1914, c. 323, 38 Stat. 730, although the Federal Trade Commission has taken no action in the premises.[b]

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 18; Dec. Dig. 28.]

At Law. Action by Frey & Son, Incorporated, against the Cudahy Packing Company. On demurrer to declaration. Overruled.

See, also, 228 Fed. 209.

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[a] For prior opinion (228 Fed. 209), see *ante*, page 375.

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Daniel W. Baker, of Washington, D. C., and *Horace T. Smith*, of Baltimore, Md., for plaintiff.

Washington Bowie, jr., of Baltimore, Mr., and *Gilbert H. Montague*, of New York City, for defendant.

ROSE, District Judge.

The plaintiff and the defendant are both corporations, one of Maryland, the other of Illinois. The plaintiff's declaration contains four counts. It charges that the defendant has violated the Sherman and the Clayton Acts to its injury, and asks damages therefor.

The third and fourth counts allege in substance that the defendant is a manufacturer of an article known as "Old Dutch Cleanser." The plaintiff, a wholesale grocer, had a trade in it of $15,000 a year in Maryland. The defendant, because plaintiff would not allow defendant to control its resale prices, refused to sell plaintiff at the same price at which it sold all other persons similarly situated, but asked it an exorbitant and prohibitive price. Defendant entered a demurrer to these counts of the declaration. It says that under the Clayton Act the courts have no jurisdiction of suits brought to recover for price discriminations, until after the Federal Trade Commission has determined that there was such discrimination. By analogy it relies upon the case of *Texas & Pacific Railway Company* v. *Abilene Cotton Oil Company*, 204 U. S. 426, 27 Sup. Ct. 350, 51 L. Ed. 553, 9 Ann. Cas. 1075, and the cases which have followed it.

It is unnecessary here to determine whether the law laid down in those decisions is or is not ever applicable to price discrimination forbidden by the Clayton Act. The facts alleged make a case analogous to that of *Pennsylvania Railroad Company* v. *International Coal Company*, 230 U. S. 184, 33 Sup. Ct. 893, 57 L. Ed. 1446, Ann. Cas. 1915A, 315, in which it was held that the courts had jurisdiction to award damages for the discrimination therein set up, although the Interstate Commerce Commission had not acted or been asked to act.

The demurrer will be overruled.

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COLE MOTOR CAR CO. *v.* HURST ET AL.

(Circuit Court of Appeals, Fifth Circuit. December 14, 1915. Rehearing denied January 17, 1916.)

[228 Fed. Rep., 280.]

APPEAL AND ERROR 171—REVIEW—CHANGE OF THEORY.—Where, in an action on contracts claimed to violate the State Anti-Trust laws, plaintiff sued on the contracts as contracts of consignment, but by the court's ruling that they were contracts of sale was compelled to proceed as if they were contracts of sale, this enforced change of attitude did not preclude an appellate court from regarding the contracts in their true light as contracts of consignment.[a]

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1053–1063; Dec. Dig. 171.]

CONTRACTS 153—VALIDITY—ADOPTING CONSTRUCTION UPHOLDING CONTRACT.—If contracts between a manufacturer of motor cars and a dealers, claimed to violate the Anti-Trust laws of the State, were open to two reasonable interpretations, one defeating the manufacturer's claim for a balance and the other enforcing it, the court would be at liberty to adopt the latter interpretation.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 734; Dec. Dig. 153.]

COMMERCE 8—INTERSTATE COMMERCE—APPLICATION OF STATE LAWS.—Contracts between a manufacturer of motor cars and a dealer, designated as a distributor, provided that cars would be invoiced to the distributor at the regular catalogue price, subject to certain discounts constituting his profits; that he should have the exclusive right to sell the manufacturer's cars in certain designated territory within the State of Texas, and not elsewhere; that remittances for all cars shipped to him would be made the same day cars were sold; that, when cars were shipped direct to his agents, sight drafts would be drawn and a check mailed by the manufacturer on Monday of each week, covering commissions due on shipments for which payments had been received during the previous week; that the distributor would keep the cars insured in the manufacturer's name until sold and paid for; that if the contract was canceled the manufacturer would take over any new cars then on the distributor's show floor at the invoice price with carload freight added; and that if the distributor canceled the contract he would take and pay for all cars on hand or in transit. The contract was made in Indiana, and the cars were to be shipped from Indiana f. o. b. to the distributor in Texas. *Held*, that the transaction was a consignment, and not a sale, and the contract was an interstate one, the validity

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of which was governed by the Federal Anti-Trust laws (act July 2, 1890, c. 647, 26 Stat. 209), and not by the Anti-Trust laws of Texas (Vernon's Sayles' Ann. Civ. St. 1914, § 7796 et seq.).

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 5; Dec. Dig. 8.]

MONOPOLIES 17—CONTRACTS—VALIDITY—RESTRAINT OF TRADE.—The contract was valid under the Anti-Trust laws, both of the United States and of Texas, as it in no way restrained competition or trade.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 13; Dec. Dig. 17.]

In Error to the District Court of the United States for the Northern District of Texas; Edward R. Meek, judge.

[281] Action by the Cole Motor Car Company against Charles F. Hurst and another. Judgment for defendants, and plaintiff brings error. Reversed, and new trial granted.

Etheridge, McCormick & Bromberg, of Dallas, Tex., for plaintiff in error.

Crane & Crane and *Jed C. Adams*, all of Dallas, Tex. (*Clendenen & Simmons*, of Ft. Worth, Tex., on the brief), for defendants in error.

Before PARDEE and WALKER, Circuit Judges, and SPEER, District Judge.

SPEER, District Judge.

The Cole Motor Car Company is a corporation and citizen of Indiana. Charles F. Hurst is a citizen of Texas, and of the district in which the instant action is brought. The Cole Company and Hurst made an agreement by which Hurst was to receive, and become the distributor of the Cole Company's automobiles for certain counties in Texas. Benjamin J. Tillar became guarantor, to the extent of $10,000, that Hurst would comply with his contract. The Cole Company shipped and delivered to Hurst, under the contract, machines in considerable number. Hurst disposed of the same, but omitted to pay to the Cole Company a balance due thereon of $11,491.27. The action was brought to re-

cover this amount, and Tillar was joined as guarantor and defendant. Having received the automobiles of the plaintiff company, and having failed to pay therefor in large part, Hurst now interposed the defense that his contract was violative of the Anti-Trust law of the State of Texas, and was therefore void. The pretense was that the contract restricted the territory in which Hurst should sell the automobiles, and also restricted the right of the plaintiff company to sell to others in the same territory. Tillar defended upon the ground that certain misrepresentations were made to secure his execution of the guaranty contract, and, further, that he had been discharged from his liability as guarantor by the failure of the plaintiff company to notify him of defaults on the part of Hurst.

Upon the conclusion of the hearing, counsel for the defendants requested the direction of a verdict in their favor. The court gave that direction in the language following:

"Gentlemen of the Jury: The court construes the contracts between the plaintiff and the defendant Hurst to be contracts of sale, and under the law is of the opinion they are void, because in conflict with the Anti-Trust laws of this State, for which reason alone I charge you to return your verdict for the defendants."

To this exception is taken. Undoubtedly Hurst should not be relieved of his obligation to pay for the cars he had received under his contract, unless under all circumstances a contract between himself and the consignor was violative of the public policy of the State. We have attentively scrutinized the record to discover such violation. There were several contracts, but they were practically the same as to terms and conditions. Hurst was to be paid a commission on each sale. He was to remit to the plaintiff company for each car as it was [282] sold by him. The cars were to be invoiced to him at a price to the purchaser fixed in advance by the company. This was subject to a discount varying from 25 to 27½ per cent from the list price. The contract is somewhat voluminous, but the material clause is the following:

"The distributor shall have the exclusive right to sell Cole motor cars in the following territory, and not elsewhere, until the expiration of this contract. That part of the State of Texas north of and includ-

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ing the following counties: Panola, Rusk, Cherokee, Anderson, Freestone, Limestone, Falls, Bell, Burnet, Llano, Mason, Menard, Schliecher, Crockett, Crane, Winkler."

Hurst, as we have seen, is designated a distributor. It appears from the record that previously to the execution of the contracts in question, Hurst, as a member of a firm, had acted as the agent of the Cole Company in putting their machines on the market. When the firm's agency ended, Hurst, as an individual, was continued as agent until the first contract decreed on was made. The crucial question here is: Did the first and subsequent contracts, with certain typewritten addenda, continue or constitute Hurst as agent or consignee, or did they evidence a sale of the motor cars to him? See *Welch* v. *Phelps & Bigelow Windmill Co.*, 89 Tex. 653–656, 36 S. W. 71.

[1, 2] That the plaintiff regarded the contracts as of consignment is made plain by the fact that the original action was brought as upon contracts of consignment. When, however, the court, over the plaintiff's objection and exception, held them to be contracts of sale, the plaintiff was driven to proceed as if they were sale contracts. Having saved its exception, this was its only resource, and we are not precluded by this enforced change of attitude from regarding the contracts in their true light. Indeed, if there were two reasonable interpretations of the contract, one defeating the plaintiff's meritorious claim and the other enforcing it, the court would be at liberty to adopt the latter.

[3, 4] From the record it appears that Tillar, the guarantor, was notified by Kuqua, the agent of the plaintiff company on the ground, that the Cole Company was about to make a contract with Hurst to ship goods on consignment, to be paid for in money as sold; that Hurst was to pay the freight on these goods, and was to insure them in the name of the Cole Motor Car Company, and that Hurst's revenue from the transaction would be the difference between the price the goods were billed to him and what he got for them. This testimony is not in dispute. Again, the first addendum to the first contract provides:

"Remittances for all cars shipped to the distributor under this agreement will be made in funds at par in Indianapolis the same day

cars are sold. When cars are shipped direct to the distributor's agents, S/D [by which we presume sight draft is meant], will be drawn direct, and check mailed by the manufacturer on Monday of each week, covering commissions due on shipments for which payments have been received during the previous week."

Had it been a sale contract, Hurst would, of course, have deducted the commissions himself.

[283] Again, it is provided:

"The distributor will keep all Cole motor cars insured in the name of the manufacturer until they are sold and paid for."

This presupposes the insurable interest, and therefore the title, in the Cole Company. It was clearly a commission contract. Kuqua, uncontradicted, testifies:

"We did not consider Mr. Hurst owed us until the cars were moved out of his possession, and the account was kept that way from the beginning."

Again, there was a provision for the cancellation of the arrangement, and in that event the manufacturer was to take over any new cars that should be on the distributor's show floor, at the invoice price, with carload freight added. No condition whatever was attached to the manufacturer's reserved right to take back the machines whenever it chose to do so. It retained unqualified rights of dominion and control, which were inconsistent with the theory that the transactions were sales.

On the other hand, Hurst agrees that if he cancels the contract he will take and pay for all cars on hand or in transit. Such provisions are not unusual in factorage contracts. See *Milburn Mfg. Co.* v. *Peak*, 89 Tex. 211, 34 S. W. 102.

As to the amount of Hurst's interest, it appears that the goods were to be invoiced to him at the regular catalogue price, subject to a discount of 25 per cent on some, and 27½ per cent on some other models. This discount, of course, constituted his profits, unless, indeed, he sold the cars for less than the catalogue price, in which event his commission was to be the difference between the price at which the cars were sold and the discount, after the list price had been taken off, which was the invoice price. The other para-

graphs of the contract provided for the number and type of cars to be shipped Hurst, the manner of advertising, and various other comparatively trivial details.

Now, the contract was made in Indiana. The cars were to be shipped from Indiana f. o. b. to Hurst in the State of Texas. Obviously this was an interstate shipment on an interstate contract. Obviously, also, since the transaction was interstate, its validity must be determined by the Anti-Trust laws of the United States rather than the Anti-Trust laws of the State of Texas; but under neither system have we been able to discover in the contract any violation of the State or National law, either in letter or principle. There is such a wealth of paramount authority upon this vital topic that it seems superfluous to offer citations. Generally it may be said that these laws were intended to prevent unlawful combinations in restraint of trade, to prevent the arbitrary fixation of the prices of certain commodities, in order to prevent or lessen competition in the manufacture, transportation, sale, or purchase of any commodity. Now, how can it be said that the contract before the court is obnoxious to the general purposes of the law? On the contrary, its effect is to foster the trade of the plaintiff company, and enhance its business to make se-[284]cure its returns. This sort of an arrangement is not obnoxious to the law. *Phillips* v. *Cement Co.*, 125 Fed. 593, 61 C. C. A. 19.

It will be seen that it was not a contract which conveyed title to Hurst, and brought his control of the machines under the operation of the Texas law. Surely the Cole Company had the right to determine that its agents should sell its cars at its own price. True, he was given the privilege of selling in certain counties, and no others, and he was restricted from selling the cars of other motor car companies in the same counties; but this method is an ordinary instrumentality by which manufacturers and others display and dispose of their goods and commodities, and make sure of payment, if they can. It is not restrictive of trade in any sense. Insurance companies, and many other occupations and trades, parcel out their territory to different agents, and make similar arrangements. That it

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could not defeat competition is obvious to the court. There are a multitude of other companies from whom purchasers can readily obtain motor cars, varying in little, if anything, from the perfectibility of the car made by the plaintiff company. It is common knowledge that most, if not all, of such motor companies avail themselves of similar arrangements. The public, indeed, finds it no small task to avoid the competition and solicitations of the agents or consignees of such companies. Periodicals of every description portray, advertise, and enlarge upon the variety and superiority of their excellences. There surely, then, has been no restraint of this trade. Was it not, then, easily possible that in the flourishing counties of the Lone Star State enumerated in the contract, notwithstanding the same, any one might have purchased a Ford, a Cadillac, a Pierce-Arrow, a Packard, a Chalmers, a Hudson, or any other of the multitudinous machines which are being constantly manufactured and offered for sale at widely varying prices? Where, then, is the restraint of trade in this transaction? It exists in the refusal of the defendant to pay the balance he owes for the automobiles he received, which, since capital is timorous, may have, for the future, some restraining effect upon similar arrangements.

We conclude, therefore, that this was a contract of consignment, and not of sale, and that it is in no sense obnoxious to the statute of the State of Texas, that the conclusion of the learned judge of the district court to that effect was erroneous, and that it should be reversed and a new trial granted; and it is so ordered.

HARVEY v. BOOTH FISHERIES CO. OF DELAWARE ET AL.

(District Court, W. D. Washington, N. D. October 27, 1915.)

[228 Fed. Rep. 782.]

Limitation of Actions 35—Limitations Applicable—Actions on Penal Statute.—Sherman Anti-Trust Act July 2, 1890, c. 647 § 7, 26 Stat. 210 (Comp. St. 1913, § 8829), provides that any person who shall be injured in his business or property by any other person or

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corporation, by anything forbidden or declared to be unlawful by that act, may sue therefor and recover threefold the damages by him sustained, with costs and a reasonable attorney's fee. Rem. & Bal. Code Wash. § 159, subd. 2, requires an action for taking, detaining, or injuring personal property, including an action for the specific recovery thereof, or for any other injury to the per[783]son or rights of another not thereinafter enumerated to be brought within three years. Sub-division 6 requires an action upon a statute for a penalty or forfeiture, where an action is given to the party aggrieved, or to such party and the State, to be brought within three years, except when the statute imposing it prescribes a different limitation. Section 165 provides that an action for relief not thereinbefore provided for shall be commenced within two years. *Held*, that an action for damages under the Sherman Act is properly brought within three years, as the statute upon which recovery is predicated is penal, while the right of recovery under section 7 is private and remedial, and under any view of the provisions of section 159 the two-year limitation does not apply.[a]

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 109, 158-167; Dec. Dig. 35.]

At law. Action by George L. Harvey against Booth Fisheries Company of Delaware and others. On demurrer to the complaint. Demurrer overruled.

Alfred Gfeller, of Seattle, Wash., for plaintiff.

McClure & McClure, of Seattle, Wash., for defendant San Juan Fishing & Packing Co.

Bogle, Graves, Merritt & Bogle, of Seattle, Wash., for defendants Booth Fisheries Co. of Delaware, Booth Fisheries Co. of Washington, and International Fisheries Co.

Kerr & McCord, of Seattle, Wash., for defendant New England Fish Co.

W. S. Osborn, of Seattle, Wash., for defendant Occidental Fish Co.

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NETERER, District Judge.

The complaint in this case is based upon section 7 of the act of July 2, 1890, 26 Stat. at Large, 209, 210, known as the Sherman Anti-Trust Act, which provides:

"Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any Circuit [District] Court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee."

Defendants have demurred to the complaint upon the ground that it is barred by the statute of limitations, and does not state facts sufficient to constitute a cause of action. It is conceded that the State statute of limitations applies. *Chattanooga Foundry* v. *Atlanta*, 203 U. S. 390, 397, 27 Sup. Ct. 65, 51 L. Ed. 241. Plaintiff contends that the action must be commenced within three years (Remington & Ballinger's Codes of Washington, § 159, subds. 2 and 6), while defendants assert that the two-year limitation applies (section 165 of the same statute). The acts complained of are alleged to have been committed between September 1, 1911, and August 1, 1912, more than two and less than three years prior to the commencement of this action.

Defendants cite *Quaker City National Bank* v. *Tacoma*, 27 Wash. 259, 67 Pac. 710; *Hinckley* v. *Seattle*, 37 Wash. 271, 79 Pac. 779; *Nestelle* v. *N. P. R. R. Co.* (C. C.) 56 Fed. 261; *Savannah & O. Canal Co.* v. *Shuman*, 98 Ga. 171, 25 S. E. 415; *Bigby* v. *Douglas*, 123 Ga. [784] 635, 51 S. E. 606; *Wood* v. *Mich. Central Co.*, 81 Mich. 358, 45 N. W. 980; *Duffies* v. *Duffies*, 76 Wis., 374, 45 N. W. 522, 8 L. R. A. 420, 20 Am. St. Rep. 79; *Welch* v. *Seattle & Montana R. R. Co.*, 56 Wash. 97, 105 Pac. 166, 26 L. R. A. (N. S.) 1047; *Suter* v. *Wenatchee Water Power Co.*, 35 Wash. 1, 76 Pac. 298, 102 Am. St. Rep. 881; *Denney* v. *Everett*, 46 Wash. 342, 89 Pac. 934, 123 Am. St. Rep. 934.

Welch v. *Seattle & Montana R. R. Co.*, *supra*, was an action by tenants of a building for damages resulting from tunneling under property adjacent to the land on which the

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building was situated. It was held not to be an action for trespass, but an injury resulting indirectly from the act complained of, and within the two-year limitation of section 165, *supra*. In *Suter* v. *Wenatchee Water Power Co.*, *supra*, damages were sought to real property by reason of an overflow caused by negligent construction of an irrigating canal. The two-year limitation was held applicable upon the same principle as in *Welch* v. *Seattle & Montana R. R.*, *supra*. In *Denny* v. *Everett*, *supra*, damages to abutting property resulting from the change of a street grade was sought, and for the same reason the two-year limitation was held to apply.

Quaker City National Bank v. *Tacoma*, *supra*, is an action upon a warrant payable out of a special street improvement fund. Misappropriation of the moneys of that fund is alleged. The cause was not commenced within three years, as provided by section 159, *supra*, and was held demurrable on that ground; but the suit was sustained because of a new and subsequent promise to pay. In *Hinckley* v. *Seattle*, *supra*, a street-assessment lien was held subject to the statute of limitations, and judgment thereon inoperative after a period of six years. In *Nestelle* v. *Northern Pac. R. Co.*, *supra*, Judge Hanford held an action by an administrator to recover damages for the death of his wife to be within the provisions of section 165, Rem. & Bal., *supra*.

In *Savannah & O. Canal Co.* v. *Shuman*, *supra*, the charter of the defendant Canal Company required it to keep its canal "in good and sufficient order, condition, and repair, and at all times free and open to the navigation of boats, rafts, * * * etc., for the transportation of goods, merchandise, and produce," etc. Failure to keep the canal in such a condition as to enable plaintiff to transport his lumber and wood over it in boats is the gravamen of the action. The trial court held the action within the limitation, under a statute providing that:

> "All suits for the enforcement of rights accruing to individuals under statutes, acts of incorporation, or by operation of law, shall be brought within twenty years after the right of action accrues."

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The Supreme Court of Georgia, in holding that limitation not applicable, said (98 Ga. at page 172, 25 S. E. at page 416):

"There is a duty imposed for the benefit of the public, and any member of the public who has sustained injury by reason of a breach of this duty has a right of action against the company; * * * but the fact that such a duty is imposed does not of itself create such a liability in favor of any individual as would bring the case within the section of the Code above quoted. In order to bring the case within this section, the liability would have to be one expressly created in favor of an individual, or a class to which he belongs, as [785] distinguished from one arising under the general law in favor of all persons who might be injured by a breach of the corporate duty."

The same principle was enunciated in *Bigby* v. *Douglas*, *supra*, by the same court, and applied to an action founded upon a statute giving to a surety the right of contribution against his co-sureties. The court, in pointing out the distinction, said:

"In other words, the General Assembly had in contemplation rights conferred by law upon particular individuals, and not upon the general public, because they sustained a peculiar relation to the incorporators of certain chartered institutions, or were by special enactment given privileges in return for services to be performed by them for the benefit of the public, or were for some other reason entitled to enforce rights which they did not share in common with their fellow citizens."

In *Wood* v. *Michigan Central*, *supra*, it was held that an action for damages for wrongful entry, destruction of fences, etc., of plaintiff, being an action for trespass on the case, does not come within the two-year limitation applicable to actions for trespass. In *Duffies* v. *Duffies*, *supra*, 76 Wis. at page 379, 45 N. W. at page 524, appears the following:

"'Personal rights' are not rights of person. The latter are physical, and the former are relative and general, and embrace all the rights any person may have, and all the wrongs he may suffer."

Plaintiff relies upon *Robinson* v. *Baltimore & S. M. & R. Co.*, 26 Wash. 484, 67 Pac. 274; *Quaker City National Bank Case*, *supra; Huntington* v. *Attrill*, 146 U. S. 657, 13 Sup. Ct. 224, 36 L. Ed. 1123; *Brady* v. *Daly*, 175 U. S. 148, 20 Sup. Ct. 62, 44 L. Ed. 109; *In re Aubrey*, 36 Wash. 308, 78 Pac. 900, 104 Am. St. Rep. 952, 1 Ann. Cas. 927; *State ex*

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rel. Richey v. *Smith*, 42 Wash. 237–247, 84 Pac. 851, 5 L. R. A. (N. S.) 674, 114 Am. St. Rep. 114, 7 Ann. Cas. 577; *Crum* v. *Johnson*, 3 Nebr. (Unof.) 826, 92 N. W. 1054.

Robinson v. *Baltimore, etc., supra*, was an action prosecuted by a widow for the death of her husband, and was held to be governed by the three-year limitation imposed by section 159, supra, under the clause "or for any other injury to the person or rights of another not hereinafter enumerated." In *Huntington* v. *Attrill*, *supra*, Justice Gray makes an extensive discussion of what constitutes a penal statute, and (146 U. S. at page 668, 13 Sup. Ct. at page 228, 36 L. Ed. 1123), says:

"The test whether a law is penal, in the strict and primary sense, is whether the wrong sought to be redressed is a wrong to the public, or a wrong to the individual, according to the classification of Blackstone: 'Wrongs are divisible into two sorts or species: Private wrongs and public wrongs.'"

And (146 U. S. at page 667, 13 Sup. Ct. at page 227, 36 L. Ed. 1123):

"Statutes giving a private action against the wrongdoer are sometimes spoken of as penal in their nature, but in such cases it has been pointed out that neither the liability imposed nor the remedy given is strictly penal. The action of an owner of property against the hundred to recover damages caused by a mob was said by Justices Willes and Buller to be 'penal against the hundred, but certainly remedial as to the sufferer.' *Hyde* v. *Cogan*, 2 Doug. 699, 705, 706."

[786] In *Brady* v. *Daly*, *supra*, 175 U. S. at pages 155, 156, 20 Sup. Ct. at page 65, 44 L. Ed. 109, it is said:

"As said by Mr. Justice Ashhurst in the King's Bench, and repeated by Mr. Justice Wilde in the Supreme Judicial Court of Massachusetts, 'it has been held, in many instances, that where a statute gives accumulative damages to the party grieved, it is not a penal action.' *Woodgate* v. *Knatchbull*, 2 T. R. 148, 154. * * * Thus a statute giving to a tenant, ousted without notice, double the yearly value of the premises against the landlord, has been held to be 'not like a penal law, where punishment is imposed for a crime,' but 'rather as a remedial than a penal law,' because 'the act indeed does give a penalty, but it is to the party grieved.'"

In re *Aubrey*, *supra*, and *State ex rel. Richey* v. *Smith*, *supra*, are cited to illustrate the proposition that every individual has the right to earn his livelihood in any lawful

trade or avocation. *Crum* v. *Johnson*, *supra*, merely holds that where different sections of the statute of limitations are equally applicable, the one allowing the longer period governs.

This is an action seeking redress for injury sustained by plaintiff in his business by reason of a public wrong by the doing of acts denounced by the Anti-Trust Act by the defendants. It was an invasion of the personal rights of the plaintiff—rights which are relative and general—and embraced rights which are common with all other persons, and as a part of the public he has a right of action for injury sustained. There is no liability to plaintiff by reason of any trespass which is expressly created in his favor, but only as it affects the public, by reason of which he suffers damages. A wrong against the public must first be done before he can be injured. The Supreme Court, in *Chattanooga Foundry* v. *Atlanta*, 203 U. S. 390, 27 Sup. Ct. 65, 51 L. Ed. 241, an action under section 7 of the Sherman Anti-Trust Act, in passing upon a statute of limitation of the State of Tennessee, providing that an action "for injury to personal property shall be commenced within three years" (203 U. S. at page 398, 27 Sup. Ct. at page 67, 51 L. Ed. 241), said:

"Of course, it was argued also that this was an injury to property, within the plain meaning of the words. But we are satisfied, on the whole, and in view of its juxtaposition with detention and conversion, that the phrase has a narrower intent. It may be that it has a somewhat broader scope than was intimated below, and that some wrongs are within it besides physical damage to tangible property. But there is a sufficiently clear distinction between injuries to property and 'injured in his business or property'; the latter being the language of the act of Congress. A man is injured in his property when his property is diminished. He would not be said to have suffered an injury to his property unless the harm fell upon some object more definite and less ideal than his total wealth. A trade-mark, or a trade-name, or a title, is property, and is regarded as an object capable of injury in various ways. But when a man is made poorer by an extravagant bill we do not regard his wealth as a unity, or the tort, if there is one, as directed against that unity as an object. We do not go behind the person of the sufferer. We say that he has been defrauded, or subjected to duress, or whatever it may be, and stop there."

Sub-division 2 of section 159, supra, I think clearly comes within this decision, and but for the provisions of sub-division

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6 the contention of the defendants would have to be sustained. Sub-division 6, however, provides that "an action upon a statute for a penalty or for[787]feiture, where an action is given to the *party aggrieved*, or to such party and the State, * * *" shall be commenced within three years, and to make it clear that the Legislature distinguished between the State and a private party, it is provided by section 160, Rem. & Bal. Washington Codes, sub-division 2, that "an action upon a statute for a forfeiture or penalty to the *State*" shall be commenced within two years. The statute upon which recovery is predicated is penal, but the right of recovery under section 7 sought in this action is private and remedial, and under any view of the provisions of section 159, supra, I think the two-year limitation does not apply, and that the complaint states facts sufficient to constitute a cause of action.

The demurrer is overruled.

COCA-COLA CO. *v.* J. G. BUTLER & SONS.

(District Court, E. D. Arkansas, W. D. February 7, 1916.)

[229 Fed. Rep., 224.]

TRADE-MARKS AND TRADE-NAMES 1—INFRINGEMENT—DECEPTION OF PUBLIC.—The protection given by law to trade-marks has for its object the protection of the owner in his property, and the protection of the public from deception, by reason of a misleading claim that the article bearing the trade-mark is the article manufactured by the owner of the trade-mark, when in fact it is but a substitute.[a]

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. §§ 1, 3; Dec. Dig. 1.]

TRADE-MARKS AND TRADE-NAMES 57—INFRINGEMENT—DECEPTION OF PUBLIC.—The use of any simulation of a trade-mark which is likely to induce common purchasers, exercising ordinary care, to buy the article to which the trade-mark is affixed, thereby indicating that it is the product of the owner of the trade-mark, is unlawful, and will be enjoined.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 65; Dec. Dig. 57.]

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TRADE-MARKS AND TRADE-NAMES 68—UNFAIR COMPETITION—USE OF TRADE-MARK.—Plaintiff, a manufacturer of a syrup constituting the principal ingredient of a beverage sold at soda fountains and in bottles, made up the syrup in two forms—one for sale through jobbers for soda fountains, and one intended for use in bottling and sold by it only to bottlers selected, designated, and licensed by it, and authorized to use thereon its distinctive tops and labels bearing its trade-mark—there being some differences in the two syrups, on account of the different purposes to which they were to be put. It guaranteed its product to be wholesome and uniform, as well as its cleanliness and excellence of manufacture, and maintained an elaborate system for the inspection of the plants of its licensed bottlers. Defendant purchased from jobbers the syrup intended for soda fountain use, and used it in manufacturing a bottled preparation which it was selling under the name of plaintiff's product, using the tops and labels prepared by plaintiff for its product. *Held*, that this constituted unfair competition, and would be enjoined.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 79; Dec. Dig. 68.]

TRADE-MARKS AND TRADE-NAMES 67—RIGHT TO MONOPOLY—STATUTORY PROVISIONS.—The monopoly given the owner of a trade-mark by the trade-mark laws is not forbidden by the Sherman Act (act July 2, 1890, c. 647, 26 Stat. 209), or any other act of Congress.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 78; Dec. Dig. 67.]

MONOPOLIES 17—SALES OF GOODS—DISCRIMINATION.—Where the manufacturer of a syrup, used as the principal ingredient in a beverage and sold by it only to bottlers licensed by it, guaranteed the purity and quality of the beverage by using distinctive tops and labels on its bottles, and to protect itself against claims for damages on the guaranty maintained a system of inspection of the plants of its licensed bottlers, it did not violate the Sherman Act, as its requirements were reasonable and beneficial to the public, in view of its responsibilities and [225] the right of purchasers to obtain the identical article which they desired to buy.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 13; Dec. Dig. 17.]

MONOPOLIES 17—SALES OF GOODS—DISCRIMINATION.—The refusal of such manufacturer to sell its syrup for bottling to a party other than its licensed bottlers, and to permit such party to use its trademark in connection with the bottled product, was not a violation of Clayton Act Oct. 15, 1914, c. 323, § 3, 38 Stat. 731, providing that it shall be unlawful to sell goods for use or resale, or to fix a price therefor, or discount or rebate from such price on the condition that the purchaser shall not use the goods of a competitor, where the effect may be to substantially lessen competition or to create a

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monopoly in any line of commerce, in view of the possibility of adulteration and the hardship to the manufacturer of maintaining such supervision over the bottling as it deemed necessary, if required to sell to every intending purchaser.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 13; Dec. Dig. 17.]

In Equity. Suit by the Coca-Cola Company against J. G. Butler & Sons. Decree for plaintiff.

The plaintiff seeks to enjoin the defendants, who constitute a mercantile firm, doing business under the firm name of J. G. Butler & Sons, from using, in connection with the manufacture, advertising, offering for sale, or sale of any beverage, the words "Coca-Cola," or any like word or words, and in any other manner infringing upon the plaintiff's rights as owner of the trade-mark "Coca-Cola," and also seeks an accounting of the damages sustained by it, by reason of the unlawful use of its trade-mark.

The material allegations in the complaint are: That the plaintiff is now, and has been ever since 1892, manufacturing and marketing a syrup for making a beverage sold to the public under the name of "Coca-Cola." That it became vested with and entitled to the sole and exclusive right to use that trade-mark, which has been duly registered in the United States Patent Office on May 14, 1892, under the provisions of the act of Congress of March 3, 1891, c. 565, 26 Stat. 1106. That on April 22, 1905, registration of the said trade-mark was again allowed by the Commissioner of Patents under the act of Congress approved February 20, 1905, c. 592, 33 Stat. 724. That it has manufactured and marketed, and is now manufacturing and marketing, two kinds of said syrup—one designed and adapted for making a beverage by mixing with carbonated water at soda fountains in the presence of the purchaser, which is intended for immediate consumption, and is a fountain drink, and is well known to the public. The other kind is designed and adapted to be used, and is used, for manufacturing a carbonated beverage put up and sold for consumption in bottles; each of them being sold by the plaintiff in distinctive packages, bearing its trade-mark name on distinctive labels. That it has at all times insured and safeguarded the manufacture and bottling

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of said carbonated bottled beverage made from its "Coca-Cola" bottling syrup, by selecting, designating, and licensing the bottlers using the said bottling sirup, and inspecting and supervising the manufacture, carbonating, and bottling of said beverage by said bottlers, so as to safeguard and insure the purchasers and consumers of said bottled product as to the quality, purity, and character thereof, and has under such circumstances and conditions, and none others, allowed and permitted the use of the name "Coca-Cola" as the trade-mark therefor, and as plaintiff's guaranty of the authenticity of the said carbonated and bottled beverage, and plaintiff's supervision, inspection, and approval thereof, and responsibility therefor. So that in connection with a bottled drink the name "Coca-Cola" is plaintiff's guaranty of genuineness and fidelity that such drink is properly made of proper materials, and is plaintiff's assur[226]ance of cleanliness and excellence of manufacture, carbonating, bottling, and sale, and is so relied upon by the purchasers and the public. That it has expended large sums of money in advertising to the public that its beverage, under its trade-name, can be had at fountains and in bottles, and that the bottled product which is offered to the public in bottles, with plaintiff's trade-mark name "Coco-Cola," applied to the bottled beverage, means to the public a beverage produced wholly under conditions which plaintiff supervises and controls, and one guaranteed throughout by plaintiff to be so produced, and to be wholesome, palatable, and uniform, and is so understood by the public. It is then charged that the defendants have put upon the market in bottles a product somewhat resembling in taste and appearance the plaintiff's bottled "Coca-Cola," but which is not plaintiff's bottled "Coca-Cola," and had applied to the crown of the bottles containing said defendant's product, and upon labels attached to the bottles, the name "Coca-Cola," as the trade-mark name therefor, without plaintiff's permission or authority; that by reason thereof the public is being deceived into the belief, contrary to the fact, that the product of the defendants is the bottled product guaranteed by the plaintiff, as aforesaid.

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The answer of the defendants pleads that they are not sufficiently informed as to some of the allegations that are set out in the complaint, and therefore demand strict proof thereof. They deny that they have put upon the market in bottles any product resembling in taste and appearance the plaintiff's bottled "Coca-Cola," but allege the truth to be that the article they have put on the market is the genuine, identical article and product known as "Coca-Cola." They admit that they have applied to the crowns of the bottles containing such product and upon labels attached thereto the name "Coca-Cola," but deny that it was done without authority. They allege that they purchased said product for the identical purpose to which they have applied the same from individuals and corporations who were the lawful owners thereof, and authorized to sell the same to these defendants for the purpose of retailing the same, bottled and carbonated as "Coca-Cola," and therefore they deny that the result of this use by them has been to deceive the public into the belief, contrary to the fact, that the product of the defendants is the product guaranteed by plaintiff to be properly made of proper materials, and made, carbonated, and bottled under the plaintiff's authority and supervision. They then plead that the plaintiff, by adopting a system of exclusive contracts, has undertaken to divide the country, and especially the territory in which the defendants are operating, into districts, whereby they have agreed to sell to such persons and corporations alone, and exclusively thus contracted, which was done for the purpose of establishing and maintaining a monopoly in the sale of said product, and preventing and destroying competition in the sale thereof, among the different purchasers, and have refused and still refuse to sell and furnish such product or commodity to the defendants upon the same terms and conditions and at the same price as they are furnishing and selling this commodity to other purchasers thereof, all of which it is charged is for the purpose and object of lessening the competition and creating a monopoly in the sale of said syrup, in violation of the laws of the United States.

The cause was submitted upon an agreed statement of facts. From this it appears: That the plaintiff is the owner

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of the trade-mark "Coca-Cola," and it has been used by it and its predecessor in title since May, 1886. That it was duly registered as a trade-mark in the United States Patent Office in conformity with the laws of the United States, as set out in the complaint. That it has advertised the same throughout the United States and in foreign countries; and that over $10,000,000 have been expended by the plaintiff in advertising it. That it is made up for the public in two forms, as alleged in the complaint. That the following differences, among others, are made between the syrup "Coca-Cola" manufactured to be used at fountains and that to be sold in bottles. In 1,250 gallons of the finished product the bottler's syrup contains 1,000 pounds more sugar than the other. It has 10 per cent more coloring matter, to wit, caramel. It contains more phosphoric acid, and some percentage less of caffeine, than does the syrup made to be used at soda fountains. The fountain syrup contains 28 pounds of caffeine to 1,250 pounds [227] of the finished product, while that used in the bottler's syrup contains only 25 pounds of caffeine to 1,250 pounds. That the plaintiff in its sales system has two methods by which the product is sold:

First. The system by which the syrup manufactured for fountain sale is sold to jobbers and dispensers, to be sold from the soda fountain; the jobbers selling it to the dispensers under a contract that the plaintiff will supply it only in the original package, that the jobber is not to sell or offer for sale as "Coca-Cola" any imitation of or substitute therefor, and upon compliance with the terms of the contract plaintiff will allow certain rebates to the jobber, depending upon the quantity bought, provided that the sales have been to dispensers only, and none to bottlers, or for the purpose of carbonating in bottles. The dispenser' contract, which he is required to sign, obligates him that, when "Coca-Cola" is asked for, he will only supply "Coca-Cola" as manufactured and furnished by the plaintiff, not to sell or offer for sale as "Coca-Cola" any imitation of or substitute therefor, and if he complies with these terms he is to receive a rebate, depending upon the quantity bought by him. The plaintiff

does not enter into a dispensers' contract directly, but only through the jobber. The fountain syrup is never sold for the purpose of bottling, and is not made or intended for the purpose of having the same bottled.

Second. The syrup made for bottling purposes is sold to two corporations—one "The Coca-Cola Bottling Company," and the other "Coca-Cola Bottling Company." This sale is made under and by virtue of contracts entered into between the plaintiff and the bottling companies. There was an original contract, which was later amended. The original contract was made on the 21st day of July, 1899, and by this contract the bottling company obligated itself to establish in the city of Atlanta, Ga., a bottling plant for the purpose of bottling this syrup, with carbonic acid and water, and to prepare and put up in bottles, or other receptacles, a carbonated drink containing a mixture of "Coca-Cola," syrup, and water charged with carbonic acid gas under a pressure of more than one atmosphere; the syrup to be in proportions of not less than one ounce to eight ounces of water. It also obligates itself to keep on hand a sufficient quantity to supply the demand in all the territory embraced in the agreement; that it is to buy all the "Coca-Cola" syrup from the plaintiff, upon the terms set forth, and it is not to buy any substitute therefor, or other syrup or substances, nor attempt to use or imitate in any article prepared by them "Coca-Cola" syrup. The plaintiff is also to furnish all necessary labels and advertising matter at its own cost. The right to use the name "Coca-Cola" and all the trade-marks and designs for labels then owned and controlled by the plaintiff, and the right to vend such preparation or mixture, bottled or put up in bottles, in the United States, except the six New England States and the States of Mississippi and Texas, is granted to them exclusively; but the right to use the name, trade-mark, and labels is to apply only to the carbonated mixture described, and is not to apply to the soda fountain business.

This contract was later amended by requiring the bottling company to buy all of the "Coca-Cola" syrup necessary to comply with the agreement directly from the plaintiff; not

to sell or in any way dispose, without the written consent of the plaintiff, of any "Coca-Cola," except after it is carbonated and bottled. The labels and advertising matter furnished by the plaintiff are to be paid for by the bottling company at what the actual cost and freight expense may be. By another amendment made to these contracts on April 24, 1915, the provision whereby the bottling company was to purchase the syrup directly from the plaintiff was amended by eliminating the condition that the bottling company is to buy all the "Coca-Cola" necessary from the plaintiff. It also eliminates from the former contracts those provisions by which the bottling company obligated itself not to use any substitute, or substitutes, or to attempt to use or imitate "Coca-Cola" syrup, and in lieu thereof the bottling company agreed not to manufacture, deal in, sell, offer for sale, use, or handle, nor attempt to do so, either directly or indirectly, any product that is a substitute for or imitation of "Coca-Cola." By another provision in this last amendment to the former contracts the plaintiff selects the bottling company as its sole exclusive customer and licensee, for the purpose of bottling [228] "Coca-Cola" in the territory heretofore acquired by it, and it agrees not to sell its fountain syrup to anyone, when it knows that such syrup is to be used for bottling purposes; that under these contracts the bottling companies are not permitted to bottle the syrup manufactured for fountain purposes; that the two bottling companies have, with the approval of the plaintiff, given the right to certain local companies, which are established in different localities, for the purpose of bottling the bottling syrup of the plaintiff; that such a contract was made with the Little Rock Coca-Cola Bottling Company for certain territory, which includes the town of Russellville and county of Pope, where the defendants are carrying on the business sought to be enjoined by this proceeding.

It is further stipulated that the plaintiff sets the standard by which its product is to be bottled, and by a system of inspection and supervision inspects and supervises the bottling of its product, wheresoever made; that it requires that its bottled product shall be bottled, using certain propor-

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tions; that the plants must be kept clean, and the cases and bottles sent out in a sanitary and presentable manner, a close supervision being kept over the character of the goods sent out; that a minute inspection is maintained in regard to the character, purity, and wholesomeness of the bottled "Coco-Cola." The bottling companies have no connection in any way, shape, or manner with the sale of the fountain product. This supervision and inspection extends to all plants that bottle "Coca-Cola," no matter where situated. The difference between these two products arose from the fact that it developed in the process of bottling that the product when bottled stood for a longer time after its carbonation than did the syrup used at the fountains, and therefore, in order to provide for this contingency, a difference had to be made in the bottled product; and, further, that the character of the trade was best supplied by making a specific syrup for the particular purpose of bottling; that the syrup is not consumed by the public, only after being mixed with the proper proportions of water; that the system of supervision and inspection exercised by the plaintiff and the parent bottling companies consists of the following:

In order to see that the product is bottled in a certain manner, and that the business is properly conducted, a system of supervisions has been organized by the plaintiff, known as the "inspection department." This inspection department has a competent man at the head, whose duty it is to divide up the territories in such a manner that they can be covered advantageously by the inspectors. Five inspectors in this department operate in the Southern States. The head inspector routes these different inspectors and follows them up. A report is required from these inspectors from each different plant visited. Samples of the product are taken from the plant, which product is tested in the plant, to see whether or not the product conforms to the standard established, these inspectors being trained men. The inspectors are equipped with gas-test gauges and hydrometers and other instruments to enable them to determine whether or not the product is being put up according to instructions. They carry other gauges and other things to test each machine

used by the bottling plant, to determine whether or not the machines are throwing the proper amount of syrup into each particular bottle. Samples are taken of the product both before and after the process of carbonation. These samples are forwarded to the head inspector at Atlanta, where they are chemically examined; and if any difference appears, they must immediately make the changes necessary to bring them to the standard prescribed by the plaintiff. If necessary, the chemical expert and a member of the advisory board are sent to make personal investigations of the plant.

The water used in the carbonating is chemically tested, and the sanitary condition of the plant is investigated, the latter being one of the main questions considered at all times. The question of carbonation in making the bottled product is given strict attention by the inspectors and chemical experts, proper carbonation depending upon the machinery, the kind of water, and the temperature of the water used. As warm water can not be carbonated, the bottling plants are required to install cooling plants to get the proper carbonation. The proper amount of carbonic-acid gas not only [229] gives the product life, but helps to preserve it against deterioration, and thereby preserves the standard of the product. This supervision and inspection is carried on in each and every bottling plant.

It is further stipulated that the defendants have not been given a contract, nor express permission, directly or indirectly, to bottle either product of the Coca-Cola Company, nor use the trade-mark "Coca-Cola." Notwithstanding this fact, the defendants are engaged in the manufacture and bottling of beverages, and are bottling and putting upon the market a product, a bottle of which is filed as evidence. The syrup used in making up this product by the defendants is the fountain syrup manufactured by the Coca-Cola Company, and which they obtain in the course of trade from jobbers or retailers who have purchased the fountain product of the Coca-Cola Company, and they bottle it without permission or authority from the plaintiff, and apply the trademark "Coca-Cola" thereto, by using the tops and labels of the plaintiff on the product, without authority from anyone authorized to give it. These purchases are made from par-

ties who are the lawful owners thereof, and who sell the same to the defendants in the due course of trade. The plaintiff, as well as the bottling companies, have refused to sell to the defendants the syrup for the purpose of bottling, although the defendants offered to purchase and pay therefor, and objected to their using the trade-mark "Coca-Cola" in connection with their bottled product, or to do anything to the plaintiff's syrup for the purpose of reselling or using the same.

Moore, Smith, Moore & Trieber, of Little Rock, Ark. (*Reed & Rogers*, of Chicago, Ill., and *Candler, Thomson & Hirsch*, of Atlanta, Ga., of counsel), for plaintiff.

Mehaffy, Reid & Mehaffy, of Little Rock, Ark., for defendants.

TRIEBER, District Judge (after stating the facts as above): It is not disputed by the defendants that the plaintiff is the lawful owner of the trade-mark "Coca-Cola," that it is an asset of great value, and that the defendants are bottling, offering for sale, and selling a bottled preparation, under the name of "Coca-Cola," using the tops and labels prepared by the plaintiff for the preparation bottled under its supervision, and furnished by it to those who are engaged in bottling it, under its authority or license, and that these tops and labels indicate to the public that it is the plaintiff's preparation, made under its supervision and guaranteed by it. Although counsel have argued many important questions, there are only two issues which, under the allegations in the bill, answer, and agreed statement of facts are necessary for the determination of this case:

(1) That the preparation bottled by the defendants is made of syrup made and sold by the plaintiff, and that it was purchased by the defendants for the identical purpose to which they have applied the same, and from parties who were the lawful owners thereof by purchase from the plaintiff, but not from the plaintiff, nor from its authorized vendees.

(2) That by its manner of doing business, as is fully set out in the agreed statement of facts, the plaintiff seeks to establish an unreasonable monopoly in restraint of trade, and therefore in violation of the act of Congress of July 2, 1890, c. 647, 26 Stat. 209, known as the "Sherman Act," and the amendments thereto, and the act of October 15, 1914, c. 323, 38 Stat. 730, and known as the "Clayton Act."

[1, 2] In determining the issues in this case it is important to keep in mind the well-established principle of law that the protection given [230] by law to trade-marks has a twofold object: To protect the owner in his property, and to protect the public from being deceived by reason of a misleading claim that the article bearing the trade-mark is the article manufactured by the owner of the trade-mark, when in fact it is not, but a substitute. The use of any simulation of a trade-mark, which is likely to induce common purchasers, exercising ordinary care, to buy the article to which the trade-mark is affixed, thereby indicating that it is the product of the owner of the trade-mark, is unlawful and will be enjoined. *McLean* v. *Fleming*, 96 U. S. 245, 251, 24 L. Ed. 828; *Kann* v. *Diamond Steel Co.*, 89 Fed. 706, 711, 32 C. C. A. 324, 329; *Layton Pure Food Co.* v. *Church & Dwight Co.*, 182 Fed. 24, 34, 104 C. C. A. 464, 474.

[3] As the plaintiff, according to the allegations in the complaint and the agreed statement of facts, in addition to selling its product, guarantees it to be wholesome, palatable, and uniform, as well as its cleanliness and excellence of manufacture, carbonating, and bottling, and for that purpose maintains a very elaborate system of supervision, it would not only be an imposition on the public, who purchase the bottled preparation, but may cause great damage to the plaintiff, if permitted.

If a person buying the bottled preparation, which has all the indicia of having been put up under the plaintiff's supervision and guaranty, the tops and labels on the bottles giving assurance of that fact, should sustain an injury by reason of the fact that it was improperly prepared, was unclean, contained unwholesome ingredients, had insufficient carbonic acid gas for its preservation, and by reason thereof

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is unfit as a beverage, or for any other cause, due to the negligence of plaintiff's licensed bottler, is injured, the plaintiff may be liable to heavy damages. Having assumed this guaranty of its bottles, the plaintiff not only has the right, but it is its duty, to take such steps as are necessary, by a proper system of inspection, to guard the public, as well as itself, against this danger. The well-recognized rule of law is that the manufacturer of any article of food, drink, or drug intended for consumption, or of any dangerous articles, may be liable to the ultimate purchaser and consumer for negligence causing an injury, although there is no direct contractual relation between them, such an action resting on tort, and not on contract. *Waters-Pierce Oil Co.* v. *Deselms*, 212 U. S. 159, 29 Sup. Ct. 270, 53 L. Ed. 453; *Standard Oil Co.* v. *Murray*, 119 Fed. 572, 57 C. C. A. 1; *Huset* v. *J. I. Case Threshing Machine Co.*, 120 Fed. 865, 57 C. C. A. 237, 240, 61 L. R. A. 303; *Riggs* v. *Standard Oil Co.* (C. C.) 130 Fed. 199; *Keep* v. *National Tube Co.* (C. C.) 154 Fed. 121; *Ketterer* v. *Armour* (D. C.) 200 Fed. 322; *Mazetti* v. *Armour*, 75 Wash. 622, 135 Pac. 633, 48 L. R. A. (N. S.) 213, Ann. Cas. 1915C, 140; *Thomas* v. *Winchester*, 6 N. Y. 397, 57 Am. Dec. 455; *Statler* v. *Mfg. Co.*, 195 N. Y. 478, 88 N. E. 1063; *Wellington* v. *Oil Co.*, 104 Mass. 64; *Roberts* v. *Brewing Co.*, 211 Mass. 449, 98 N. E. 95; *Norton* v. *Sewall*, 106 Mass. 143, 8 Am. Rep. 298; *Bishop* v. *Weber*, 139 Mass. 411, 1 N. E. 154, 52 Am. Rep. 715; *Peters* v. *Johnson*, 50 W. Va. 644, 41 S. E. 190, 57 L. R. A. 428, 88 Am. St. Rep. 909; *Peterson* v. *Standard Oil Co.*, 55 [231] Or. 511, 106 Pac. 337, Ann. Cas. 1912A, 625; *Tomlinson* v. *Armour & Co.*, 75 N. J. Law, 748, 70 Atl. 314, 19 L. R. A. (N. S.) 923; *Dixon* v. *Bell*, 5 Maul. & Sel. 198.

The fact that the syrup used by the defendants is that manufactured by the plaintiff, assuming that it had been made for bottling purposes, is immaterial, for the syrup, although the principal ingredient of the finished product, is only one of several used for the preparation, when offered to the consumer. To maintain the reputation, and consequently the favor of the consuming public, it is important to the manufacturer of the preparation bearing its trade-

mark that it should be wholesome, palatable, clean, and free from all impure and dangerous substances, regardless of the fact whether it was bottled by itself and sold by it directly to the consumer, or through its licensees. In this case the bill charges, and the agreed statement of facts admits, that the plaintiff manufactures two different syrups—one for bottling and the other for fountain trade; that the syrup for bottling purposes differs in several material respects from that intended for the fountain trade; that the bottler's syrup contains more sugar, has 10 per cent more caramel for coloring purposes, contains more phosphoric acid, and less caffeine than the fountain syrup; and these two syrups are put up and sold in distinctive packages.

The authorities are numerous that, when a manufacturer of only one article of food and drink sells it in bulk, and also puts it up in bottles, the latter bearing a distinctive trade-mark, a purchaser of the article in bulk will be guilty of unfair competition, and enjoined, if bottling it and affixing the manufacturer's distinctive labels upon the goods bottled by him. *Krauss* v. *Peebles Co.* (C. C.) 58 Fed. 585, 592; *People* v. *Luhrs*, 195 N. Y. 377, 89 N. E. 171, 25 L. R. A. (N. S.) 473; *Hennessy* v. *White*, Cox, Manual Trade-Mark Cases, 377; Browne on Trade-Marks, §§ 910, 759, and authorities there cited. One of the reasons given for this rule is that "unless the manufacturer can control the bottling, he can not guarantee that it is the genuine article prepared by him." To this may be added that he can not tell whether it is bottled in so careful a manner as is essential to the preservation of the article and the maintenance of its good reputation. This rule, of course, applies with much greater force when there are two varieties manufactured by the same party and sold under the same trade-mark, but intended to be placed on the market for different purposes, as is the case in the instant cause. *Russia Cement Co.* v. *Katzenstein* (C. C.) 109 Fed. 314; *Cook & Bernheimer* v. *Ross* (C. C.) 73 Fed. 203; *Thomas G. Plant Co.* v. *May Mercantile Co.* (C. C.) 153 Fed. 229; *McIlhenny* v. *Hathaway* (D. C.) 195 Fed. 652; *Gillott* v. *Kettle*, 3 Duer (N. Y.) 624; *Spalding* v. *Gamage*, 32 R. P. C. 273; Sebastian on Trade-

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Marks, page 159; Hopkins on Trade-Marks, page 275. A case almost identical with the facts in this case is *Charles E. Hires Co.* v. *Xepapas* (C. C.) 180 Fed. 952.

In *Powell* v. *Birmingham* (*Yorkshire Relish case*), 14 R. P. C. 730, it was testified that the difference between the two articles under consideration was only a pinch of salt, and the court held that, even in the case of such a small difference, the defendant had not proven [232] the identity of their product with the plaintiff's. Of what benefit would a trade-mark be, if one buying the article protected by it were permitted to adulterate it, or given an opportunity to do so, and then offer it to the public as the genuine article, protected by the trade-mark? The greatest value of a trade-mark is the reputation established by the excellence of the article, and the knowledge and appreciation of that fact by the consuming public. An article without any merit can derive no benefit from a trade-mark, and only a temporary benefit from the most extensive advertisement. It is like the value of a "good will" in an established going concern. It depends upon the successful operation of the business. Without that there is no value to it. Who would pay for the good will of a business conducted at a loss? The court is clearly of the opinion that, upon the facts in this case, the defendants are guilty of unfair competition.

[4] Do the facts show a violation of the Sherman Act against monopolies and stifling competition? The trade-mark laws, like the patent laws, give the owner a monopoly which neither the Sherman Act nor any other act of Congress forbids. It would be a paradox to say that the exercise of a right, expressly granted by law, is unlawful.

[5] Counsel for defendants rely on *Dr. Miles Medical Co.* v. *Park & Sons Co.*, 220 U. S. 373, 31 Sup. Ct. 376, 55 L. Ed. 502, and *Coca-Cola Co.* v. *Bennett* (D. C.) 225 Fed. 429. What was decided in the Dr. Miles Medical Company case was that the manufacturer of an unpatented proprietary medicine can not, after an absolute sale of the article, fix the prices for future sales. The court, in its opinion in that case, holds that the restraint of trade must be determined by the particular circumstances of the case, and the nature of

the principles which are involved in it, and whether it is reasonable or unreasonable. In *Coca-Cola Co.* v. *Bennett*, there was no question of unfair competition claimed by the plaintiff, which is the cause of complaint in this case. Nor was there any claim in that case that the plaintiff guaranteed the purity, cleanliness, wholesomeness, and quality, by using its distinctive tops and labels on its bottles, and that, for the purpose of protecting itself against claims for damages on that guaranty, it maintains a system of supervision and inspection, as set out in the agreed statement of facts herein. Nor did it appear in that case that the defendants used for bottling the syrup intended for soda fountains, and which was not suitable for that purpose. The court also found that the defendants made the preparation in the identical manner contemplated by the parties. That case is therefore not applicable. In view of the responsibilities of the plaintiff and the right of the purchasers to obtain the identical article, which they desire to buy, the requirements of the plaintiff are reasonable, and in the end beneficial to the public.

[6] Are plaintiff's acts in violation of the "Clayton Act"? That act provides (section 3):

"That it shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or [288] other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

This act is invoked by the counsel for the defendants, in view of the agreed statement of facts that:

"The plaintiff, as well as the bottling companies, through whom its syrup is sold to the retail dealer, have refused to sell to the defendants the syrup for the purpose of bottling, although the defend-

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ants offered to purchase and pay therefor, and objected to their use of the trade-mark 'Coca-Cola,' in connection with their bottled product."

Whether that act is to be construed so as to compel one to sell his wares or manufactures to any one applying therefor cannot be determined in this case, as this is not an action to obtain relief of that nature and is therefore not involved. Any one interested in that question may consult *Union Pacific Coal Co.* v. *United States*, 173 Fed. 737, 97 C. C. A. 578, and *Great Atlantic & Pacific Tea Co.* v. *Cream of Wheat Co.* (D. C.) 224 Fed. 566, affirmed 227 Fed. 46, 138 C. C. A. 123.

The issue in this case, as has been hereinbefore set forth, is whether one purchasing one of the ingredients of a preparation, although it be the chief one, can use it, without permission of the manufacturer, in such a manner that it may injuriously affect the manufacturer, the intending purchaser having the means to adulterate it, and by the use of the trade-mark and name of the manufacturer sell it to the public as the genuine article. It would, although not impossible, certainly be a great hardship on the plaintiff, if it were required to permit its preparation to be bottled in every community throughout the United States, no matter how small the purchases for that community may be, and maintain such supervision over the bottling as under its system it maintains and deems necessary. By confining its sales to bottling companies doing business in cities so centrally located as to be able to supply the demand for its syrup, and at the same time enable it to supervise the bottling under its system, it does all which can be reasonably expected of it, and the law demands. The plaintiff, like all other manufacturers and dealers, is no doubt anxious to extend its trade as much as possible, and self-interest, if nothing else, will induce its preparation to be bottled in as many places as the trade, and its own interests, will justify.

The court is of the opinion that the defendants are guilty of unfair competition, and that the business of the plaintiff, as conducted, is not in violation of any of the "Anti-Trust acts" of the United States. A decree granting a permanent injunction in conformity with the prayer of the bill may be prepared and submitted to the court for approval.

Syllabus.

UNITED STATES v. KING ET AL.

(District Court, D. Massachusetts. October 23, 1915.)

[229 Fed. Rep., 275.]

MONOPOLIES 31—CRIMINAL PROSECUTIONS—SUFFICIENCY OF INDICTMENT.—An indictment alleged that defendants entered into a conspiracy that they should appoint an executive committee, that the executive committee should constitute a listing committee, that the listing committee should cause a list of undesirable persons to be prepared and published, and that defendants should thereafter refuse to have any further business dealings with such blacklisted persons, that the defendants did appoint a listing committee, that in pursuance of the conspiracy and to effect its object the committee blacklisted a person named, and defendants refused to deal with him, thereby restraining him from carrying on interstate trade. *Held*, that this sufficiently alleged that the conspiracy was actually entered upon and engaged in, and the use of the word "should" did not render it insufficient in this respect.[a]

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 20; Dec. Dig. 31.]

INDICTMENT AND INFORMATION 125—MONOPOLIES—CRIMINAL PROSECUTIONS—DUPLICITY.—Such indictment was not bad for duplicity, as charging both a conspiracy in restraint of trade and an actual restraint of trade, as the overt acts described were alleged in support of the charge of conspiracy, and not as separate crimes.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 334–400; Dec. Dig. 125.]

INDICTMENT AND INFORMATION 86—REQUISITES AND SUFFICIENCY—ALLEGATIONS AS TO VENUE.—An indictment for a conspiracy in restraint of trade alleged that at Boston, in the district of Massachusetts, the defendants therein named [276] unlawfully, etc., entered into a conspiracy therein described, and that, in pursuance of such conspiracy and to effect its object, they did certain acts. *Held*, that this sufficiently alleged a crime committed by each of the defendants within the district of Massachusetts.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 230–243; Dec. Dig. 86.]

MONOPOLIES 31—CRIMINAL PROSECUTIONS—SUFFICIENCY OF INDICTMENT.—Interstate shippers of an especially desirable variety of potato formed a shippers' association, the members of which made 75 per cent of all interstate shipments of such potatoes. The association acted through a committee, which was authorized to determine whether any person producing, receiving, or dealing in such

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potatoes was undesirable. Persons adjudged undesirable were put on a black list, which was circulated among the members, who were forbidden under a penalty from having any business dealings with blacklisted persons. The black list was also circulated among non-members, dealing in potatoes as buyers, sellers, commission merchants, or otherwise, and such non-members were notified that, unless they ceased dealing with blacklisted persons they would be blacklisted, and members of the association would no longer deal with them. An indictment for a conspiracy in restraint of trade did not state the object of the association or the reasons for which persons were blacklisted. *Held*, that on demurrer it must be assumed that these reasons were legitimate, and hence the indictment did not show that defendants were not within their rights in forming the association, blacklisting persons, and agreeing that the members would not deal with such blacklisted persons, but that in going outside its own membership and attempting to coerce non-members from dealing with those blacklisted it was an illegal conspiracy.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 20; Dec. Dig. 31.]

MONOPOLIES 17—COMBINATIONS PROHIBITED—BOYCOTTS—SECONDARY BOYCOTTS.—Where it was intended to restrain the trade of the blacklisted persons, the "secondary boycott," or attempt of the members of the association to coerce non-members into refraining from dealing with blacklisted persons, was illegal under the Sherman Act (act July 2, 1890, c. 647, 26 Stat. 209 [Comp. St. 1913, §§ 8820–8830]), regardless of defendants' purpose or motive as no purpose or motive could make such action justifiable or such restraint legal.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 13; Dec. Dig. 17.]

MONOPOLIES 31—CRIMINAL PROSECUTIONS—SUFFICIENCY OF INDICTMENT.—Where an indictment against the members of a potato shippers' association, the members of which controlled 75 per cent of an especially desirable variety of potatoes, for conspiracy in restraint of trade, alleged that persons engaged in buying, selling, or dealing in such potatoes could not obtain sufficient quantities to meet their legitimate demands unless potatoes were supplied to them by such members, it sufficiently appeared that it was intended to restrain the trade of persons blacklisted by the association, as the refusal to do business with them would restrain their trade, and the intent must be presumed from the act itself.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 20; Dec. Dig. 31.]

Carl C. King and others were indicted for a conspiracy in restraint of trade. On demurrer to the indictment. Demurrer overruled.

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[277] *George W. Anderson*, U. S. Atty., and *Leo A. Rogers*, Asst. U. S. Atty., both of Boston, Mass.

Herbert Parker, of Boston, Mass., for defendants.

MORTON, District Judge.

This is an indictment for a conspiracy in restraint of trade under the Sherman Act. The defendants have demurred, and have assigned many causes of demurrer, which fall into two groups, viz, those which relate to the language of the indictment, and those which relate to its subject matter.

[1] As to the objections based on the alleged insufficiency or inaccuracy of the language:

The defendants contend that the indictment does not allege that a conspiracy was actually entered upon and engaged in. This argument is based principally upon the use of the word "should" in that part of the indictment which undertakes to describe the conspiracy. It alleges that the defendants unlawfully and knowingly entered into a conspiracy in unreasonable restraint of trade, which conspiracy was, in substance, that the defendants "should appoint" an executive committee, that such executive committee "should constitute" a listing committee, that said listing committee "should cause" a list of undesirable receivers to be prepared and published, that all the members of the association "should thereafter refuse to have any further business dealings" with the blacklisted persons, etc. The indictment then goes on to allege that the defendants constituted said listing committee, and, "in pursuance of said conspiracy and to effect the object thereof" did blacklist one McLatchy, and that the remaining members of the association refused to deal with him, thereby restraining him from carrying on interstate trade.

It is thus explicitly alleged that the defendants engaged in a conspiracy that they should do certain things, and that they did certain acts in carrying it out. An agreement is not infrequently stated in the form "It was agreed that the parties should do," etc. Such language means, as I

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understand it, that the agreement was actually made. The indictment is to be taken as a whole, and in the fair meaning of the words used; so considered, it sufficiently charges that the defendants entered into the conspiracy which is described. To apply the test suggested in the defendants' brief, it seems to me plain from the indictment "that the combination or agreement between the alleged conspirators had developed from the mere contemplation of a tentative plan into a definite, initiated, operative course of action."

[2] The defendants also contend, rather inconsistently, perhaps, that the indictment is bad for duplicity, because it charges both a conspiracy in restraint of trade and an actual restraint of trade. It is, however, clear that what the indictment charges is a conspiracy, and that the overt acts described in it are alleged in support of that charge, and not as separate crimes.

[3] In the case of Doyle, it is further argued that the indictment does not allege any criminal act committed by him in this district. It does, however, explicitly state that, "at Boston, in said district of Massachusetts, said defendants [i. e., King, Hovey, Powers, Doyle, and [278] Sylvester] unlawfully, knowingly, and feloniously entered into a conspiracy with each other," etc. This, in connection with the rest of the indictment, sufficiently alleges a crime committed by Doyle in this district.

Coming to the substance of the charge, the indictment, as I construe it, describes the following business situation:

[4] An especially desirable variety of potato is grown in Maine, which is well known under the name of Aroostook County potatoes. There is an extensive interstate trade in them. Persons interested in that trade formed an association called the Aroostook Potato Shippers' Association. Seventy-five per cent of all interstate shipments from Maine of Aroostook County potatoes were made by members of this association. It acted through a committee. The committee was authorized to determine whether any given person who carried on the business of producing, receiving, or dealing in such potatoes was "undesirable." The basis upon which this determination was to be made does not appear.

The persons adjudged "undesirable" were thereupon put on a black list. This black list was circulated among the members of the association, and they were forbidden by its bylaws, under a penalty, from having any business dealings with a blacklisted person. The black list was also circulated among persons dealing in potatoes, either as buyers, sellers, commission merchants, or otherwise, who were not members of the association; and such persons were notified that, unless they ceased dealing with the blacklisted person, members of the association would not longer deal with them, and they themselves would be blacklisted. Is such an association legal under the Sherman Act?

Persons have a right to associate for the purpose of advancing their own interests by discriminating against other persons, if such discrimination is based upon proper and legal grounds, e. g., failure to pay bills due to members of the association (*Brewster* v. *Miller*, 101 Ky. 368, 41 S. W. 301, 38 L. R. A. 505), and is not merely coercive and arbitrary, as in *Martell* v. *White*, 185 Mass. 255, 69 N. E. 1085, 64 L. R. A. 260, 102 Am. St. Rep. 341; nor for the purpose of restraining interstate trade, as in *Eastern States Lumber Association* v. *U. S.*, 234 U. S. 600, 34 Sup. Ct. 951, 58 L. Ed. 1490, L. R. A. 1915A, 788.

The object of the Aroostook Association is nowhere described in the indictment; and there is no allegation of any purpose or intent by its members or by the defendants to restrain trade. The reasons for which it blacklisted persons are not stated; they do not appear to have related to the sale or purchase of commodities or to interstate commerce; they may have been, and on this demurrer must be assumed to have been, legitimate. It does not appear that the defendants were not within their rights in the formation of their association, in giving its officers the right to blacklist, and in agreeing that members would not deal with blacklisted person. Up to a certain point, the situation described is not legally different from that which arises when the executive officers of a labor union declare a strike against a certain employer to obtain shorter hours, higher wages, or some [279] other legitimate end. A strike is

merely an agreement by all the members of the union not to do business with that employer.

[5, 6] But the defendants' association did not confine its activities to its own members and their relations to such persons as from time to time might be placed upon its black list. It went further, and contemplated that the black list, made by its executive committee, should be circulated among non-members as well as members, and that outsiders should be notified that they, too, must refrain from doing business with the persons who had been blacklisted by the association, or they, too, would be blacklisted. This was referred to in argument as "a secondary boycott." If done with the intent to restrain trade with the victim and thereby to coerce him, it is exactly what was outlawed by the Supreme Court in the Danbury Hatters' case, *Lawlor* v. *Loewe*, 235 U. S. 522, 35 Sup. Ct. 170, 59 L. Ed. 341. If an intent to restrain trade is apparent from the indictment, it need not be explicitly alleged. This was decided in *U. S.* v. *Patten*, 226 U. S. 525, 543, 33 Sup. Ct. 141, 57 L. Ed. 333, 44 L. R. A. (N. S.) 325. When an association controlling 75 per cent of a certain commodity refuses to do business with any given dealer in it, its action so clearly and naturally restrains his trade that an intent to do so must, I think, be presumed from the act itself. In this case it is explicitly alleged that persons engaged in the business of buying, selling, or dealing in Aroostook County potatoes could not obtain sufficient quantities of such potatoes "to meet the legitimate demands of their several businesses unless in some part Aroostook County potatoes are supplied to them by the persons aforesaid, members of the Aroostook Potato Shippers' Association." The indictment thus alleges a conspiracy in restraint of trade of such character as to warrant an imputation of an intent to accomplish that result.

The final question is whether the restraint appears to have been unreasonable or illegal. As before stated, the indictment is wholly silent as to the grounds upon which the blacklisting was done, or the purpose of it. If a secondary boycott is ever legal, it must be assumed to have been so in this instance; but I think it never is. In *Pickett*

v. *Walsh*, 192 Mass. 572, at page 588, 78 N. E. 753, at page 760 [6 L. R. A. (N. S.) 1067, 116 Am. St. Rep. 272, 7 Ann. Cas. 638], it was held that "organized labor's right of coercion and compulsion is limited to strikes against persons with whom the organization has a trade dispute"; and in *Plant* v. *Woods*, 176 Mass. 492, at page 502, 57 N. E. 1011, at page 1015 [51 L. R. A. 339, 79 Am. St. Rep. 330], it was said: "The defendants might make such lawful rules as they pleased for the regulation of their own conduct, but they had no right to force other persons to join them." See, too, *Cornellier* v. *Haverhill Shoe Manufacturers' Association*, 221 Mass. 554, 109 N. E. 643 (Supreme Judicial Court Massachusetts, September, 1915).

Under the Sherman Act the right of combination is certainly not greater than at common law.

"In other words, the trade of the wholesaler with strangers was directly affected, not because of any supposed wrong which he had done to them, but because of the grievance of a member of one of the associations, who had re[280]ported a wrong to himself, which grievance, when brought to the attention of others, it was hoped would deter them from dealing with the offending party. This practice takes the case out of those normal and usual agreements in aid of trade and commerce which may be found not to be within the act, and puts it within the prohibited class of undue and unreasonable restraints, such as was the particular subject of condemnation in *Loewe* v. *Lawlor*, *supra*.

"The argument that the course pursued is necessary to the protection of the retail trade and promotive of the public welfare in providing retail facilities is answered by the fact that Congress, with the right to control the field of interstate commerce, has so legislated as to prevent resort to practices which unduly restrain competition or unduly obstruct the free flow of such commerce, and private choice of means must yield to the national authority thus exerted. *Addyston Pipe Co.* v. *United States*, 175 U. S. 211, 241, 242 [20 Sup. Ct. 96, 44 L. Ed. 136]."

Day, J., *Eastern States Lumber Association* v. *U. S.*, 234 U. S. 600, at 612, 34 Sup. Ct. 951, at 954 [58 L. Ed. 1490, L. R. A. 1915A, 788].

The association may have had the right to blacklist persons for legal and sufficient causes and objects, and to compel its members to refrain from dealing with them. But it had no right to endeavor to enforce its judgments by insisting that outsiders also obey them or else be blacklisted. No purpose or motive could make such action justifiable or such

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restraint legal. It follows that the restraint of trade described in the indictment was of an illegal character.

Demurrer overruled.

HOOD RUBBER CO. *v.* UNITED STATES RUBBER CO. ET AL.

(District Court, D. Massachusetts. January 11, 1916.)

[229 Fed. Rep., 583.]

MONOPOLIES 17—COMBINATIONS PROHIBITED—SALES OF GOODS.—Six of the defendants, all of whom were citizens of and doing business in Massachusetts, were manufacturers of lasts or forms used in making rubber boots and shoes, and were the only makers thereof in the United States. A rubber company acquired control of other corporations engaged in the manufacture and interstate sale of rubber footwear, for the purpose of controlling them and controlling prices of such goods, and with the intent of restricting and controlling the interstate sale and transportation of lasts made separate agreements with each of the last manufacturers whereby they agreed to sell no lasts for a certain period, except to persons and corporations specified by it. By means of these agreements it restricted and controlled the interstate sale of lasts, and deprived other persons engaged in the interstate sale of rubber footwear, including plaintiff, of the ability to procure lasts. *Held* that, where it did not appear that any of the last manufacturers intended to restrict and control trade, or knew of the contracts between the rubber company and the other last manufacturers, or knew of its purpose or intent to restrain and control trade, and none of such manufacturers occupied any dominating position in the trade in lasts, there was no combination or conspiracy in restraint of the trade, and the last manufacturers were within their rights in making the contracts, and were not liable under Sherman Act July 2, 1890, c. 647, 26 Stat. 209, for having done so.[a]

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 13; Dec. Dig. 17.]

MONOPOLIES 28—ACTIONS FOR DAMAGES—COMBINATIONS DISTINGUISHED FROM CONTRACTS.—A declaration, setting out the facts mentioned, stated no combination or conspiracy in restraint of trade, as against the rubber company, and was to be supported, if at all, as alleging contracts made by it in unreasonable restraint of interstate trade, or a monopolization of that trade.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 18; Dec. Dig. 28.]

Statement of the Case.

MONOPOLIES 28—ACTIONS FOR DAMAGES—PERSONS ENTITLED TO DAMAGES.—The fact that plaintiff was a citizen of Massachusetts, manufacturing rubber footwear in that State, and was not a dealer in lasts, and only desired to buy lasts for its own use, and not for resale, did not deprive the restraint of trade, so far as it affected plaintiff, of the interstate character necessary to bring it within the Sherman Act, as the restraint or control obtained by the rubber company was a single thing, not confined to Massachusetts, and restricted the trade of the last manufacturers with everybody, including citizens of their own State.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 18; Dec. Dig. 28.]

[584] MONOPOLIES 28—ACTIONS FOR DAMAGES—PLEADING—"TRADE"—"CONTROL"—"MONOPOLY."—A declaration, in an action for damages against the rubber company, alleging that by means of such contracts it illegally restricted, limited, and controlled the interstate sale and transportation of lasts, though not explicitly and in the language of the statute alleging a monopolizing, or an attempt to monopolize, stated a cause of action under Sherman Act, § 2 (U. S. Comp. St. 1913, § 8821), prohibiting every person from monopolizing or attempting to monopolize any part of the trade or commerce among the several States, as "trade" necessarily involves both buying and selling, and a complete domination of either is a domination of the trade, and "control," as used in the declaration, was the substantial equivalent of "monopoly," as used in the statute.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 18; Dec. Dig. 28.

For other definitions, see Words and Phrases, First and Second Series, Monopoly; Trade; Control.]

Action by the Hood Rubber Company against the United States Rubber Company and others. On demurrer to the declaration. Demurrer of the defendant named overruled, and demurrers of the other defendants sustained.

Henry E. Warner and *Arthur H. Brooks*, both of Boston, Mass., for plaintiff.

Robert M. Morse, *Wilford D. Gray*, *George L. Huntress*, and *Homer Albers*, all of Boston, Mass., for defendant United States Rubber Co.

Chamberlain & Fletcher, of Brockton, Mass., for defendants Deland and Cary.

Opinion of the Court.

MORTON, District Judge.

This is an action at law under the Sherman Act (26 Stat. 209) to recover threefold damages. The defendants are the United States Rubber Company, a New Jersey corporation engaged in the manufacture of rubber footwear (which will be referred to as the defendant where not otherwise indicated), and six other persons and corporations, all citizens of Massachusetts, and engaged separately in that State in the manufacture of lasts used in making rubber boots and shoes. The defendants have demurred, and the question is whether the declaration states a cause of action.

It contains seven counts, the first of which, as I construe it, describes the following business situation: Lasts or forms are necessary tools or appliances in the manufacture of rubber boots and shoes. In April, 1896, the only makers of them in the United States were the six last-named defendants, who, as it happened, were all citizens of Massachusetts, and did business here, and nowhere else. They sold their product extensively in interstate commerce. In the month referred to the principal defendant acquired control of ten different corporations, organized under the laws of several different States, each of which was engaged in the manufacture and interstate sale of rubber footwear. It did this for the purpose of controlling such rubber companies as were then, or might thereafter be, engaged in [585] the interstate sale of rubber boots and shoes, and of controlling the prices asked for such goods.

In manufacturing rubber footwear, lasts are absolutely essential. The United States Rubber Company, with the intent of restricting and controlling the interstate sale and transportation of them, made in April, 1896, agreements with every one of the last manufacturers, whereby they separately agreed to sell no lasts until January 1, 1897, except to such persons and corporations as might be specified by the defendant. By means of these agreements the defendant restricted and controlled the interstate sale of lasts for rubber boots and shoes from the time when the agreements were made, in April, 1896, until they expired on January 1, 1897, and during that interval deprived other persons engaged in

interstate sale of rubber footwear of all opportunity to procure lasts in this country.

In April, 1896, F. C. Hood and A. N. Hood left the employ of one of the rubber companies then controlled by the defendant, and began a rubber business under the name of the Hood Rubber Company. They bought land, and contracted for buildings and machinery to manufacture rubber boots and shoes, and took steps to form a corporation for that purpose. Before the corporation was chartered, F. C. Hood "on behalf of such corporation to be formed as aforesaid sent an order for" lasts to one of the defendant last companies (declaration, clause 9). This company wrote to the principal defendant, asking to be released from its agreement not to sell to other than designated persons. The defendant declined to grant such release by a letter which is set out in the declaration, and might be found, in connection with the other facts alleged, to evidence an intent to restrict or monopolize the trade in lasts by the contracts referred to. Thereafter F. C. Hood, "doing business as the Hood Rubber Company, and acting on behalf of himself and others who were forming the plaintiff corporation of the same name, endeavored to procure lasts from each and every one of said last companies, * * * and each and every one of the last companies refused to furnish lasts to the plaintiff, or to any rubber company not named in its contract with the defendant" (declaration, par. 10). Hood, on behalf of the plaintiff, made every endeavor to procure lasts within the United States, but was unable to do so. On or about October 12, 1896, the plaintiff corporation received its charter, and immediately afterward made further efforts to buy lasts from the manufacturers of them, but was unable to obtain any suitable ones until the expiration of said contracts relating to them.

The contracts between the United States Rubber Company and the last companies greatly restricted the trade in such lasts and subjected such trade to the absolute control of the principal defendant; and the contracts, conspiracies, and monopolies between the defendant and the last companies were made with that intent, and to accomplish that result.

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There are allegations of damage to the plaintiff by the defendants' acts. This is the case stated in the first count.

Each of the remaining counts relates especially to some particular one of the contracts referred to between the defendant and the last [586] companies; each incorporates by reference the first count, so far as material, alleges that "said contract, agreement, or conspiracy was illegal and void," and claims damages on account thereof.

[1] There are no allegations that any one of the last companies knew that the rubber company was making contracts with other last companies, or was aware of any purpose or intent by the rubber company to restrain and control trade by the contract made with it, or was informed in any way that its contract was part of an effort by the rubber company to control and restrict interstate commerce by a series of such contracts tying up all the last companies. No one of the last companies, apparently, occupied any dominating position in that trade. Upon the allegations of the declaration, nothing more is shown than that each independently agreed to hold all its product adapted to rubber footwear for the defendant, or subject to its orders.

In the absence of any purpose or intent on the part of any of the last companies to restrict and control trade by its contract, and of any knowledge that the other party to the contract was making it in pursuance of a plan to restrict, control, or monopolize interstate commerce, and of any sufficient reason to believe that such would be the natural effect of the contract with the defendant, the last companies were, in my opinion, clearly within their rights in making the contracts in question, and are not liable under the Sherman Act for having done so. Upon the same reasoning, it seems to me apparent that this declaration does not allege any combination or conspiracy in restraint of the trade in lasts. There is an entire absence of that joint or common purpose and action which are the essence of a combination or conspiracy. The attempted control was reached for by the rubber company on its own account, and, so far as is alleged, without taking any other person into its confidence or apprising any other defendant of its intent. No other person participated or

knowingly assisted in the illegal plan afoot. As to the last companies, no cause of action under the Sherman Act is stated.

[2] As against the United States Rubber Company, the declaration does not set out any combination or conspiracy in restraint of trade. It is to be supported, if at all, as alleging contracts made by the rubber company in unreasonable restraint of interstate trade, or a monopolization of that trade. It plainly relates to restraint or control of trade in lasts, not in boots and shoes, and it alleges a complete and intentional restraint and control thereof by the defendant.

[3] The first important contention of the defense is that the restriction and control relied on by the plaintiff cover only the manufacture and sale of lasts by companies within a single State, Massachusetts; that the plaintiff is a citizen of Massachusetts, and manufactures only in that State; that the plaintiff is not a dealer in lasts, but only desired to buy them for its own use; that all purchases of lasts by the plaintiff would have been intrastate transactions; and that the alleged restraint, so far as it affected plaintiff, was not of an interstate character and is not within the Sherman Act.

If the defendant's agreements with the last companies had related only to trade within Massachusetts, unquestionably the plaintiff would [587] have had no right of action under the Sherman Act. *Addyston Pipe & Steel Co.* v. *U. S.*, 175 U. S. 211, 20 Sup. Ct. 96, 44 L. Ed. 136. But the restraint and control actually and intentionally obtained are not so limited; they include all of the United States, Massachusetts among them, and they restrict the trade of the last companies with everybody, including, of course, citizens of their own State. The defendant's control within the State was part of the larger complete control which it designed to secure; there was no separate agreement relating only to the trade in lasts within Massachusetts. If the plaintiff had happened to reside out of Massachusetts, it would seem clear, on this branch of the case, that the Sherman Act applied and had been violated. If the plain-

tiff, though residing in Massachusetts, had been a dealer in lasts, selling them beyond the borders of that State, the defendant's alleged conduct would have interfered with the flow of that interstate trade in which the plaintiff was engaged, and the case would have come within the decisions in *Gibbs* v. *McNeeley*, 118 Fed. 120, 55 C. C. A. 70, 60 L. R. A. 152 (C. C. A. 9th Circuit), and *Hale* v. *Hatch & North Coal Co.*, 204 Fed. 433, 122 C. C. A. 619 (C. C. A. 2d Circuit).

Does the fact that the person injured by an interstate restriction or control of an illegal purpose and character happens to reside within the same State where the entire trade which is the subject of the restriction or control originates deprive him of the right to a remedy under the statute? In other words, is the statute applicable to such a case? It seems to me that it is. The restraint or control obtained by the defendant, and by which the plaintiff was injured, was a single thing, not confined to Massachusetts, but extending to and including New York and Pennsylvania, for instance, and other States into which the trade might reach. Such a control the defendant had, upon the allegations of the declaration, no right to acquire, and having done so intentionally and unlawfully, it is liable for the consequences of its illegal conduct. I do not think that the decision in the *Addyston Pipe case*, 175 U. S. 211, 20 Sup. Ct. 96, 44 L. Ed. 136, is inconsistent with these views. What was excepted from the injunction in that case, as I understand it, was separate agreements among defendants within a single State, relating only to trade within that State. The restraint condemned in the Reading case (*U. S.* v. *Reading*, 226 U. S. 324, 33 Sup. Ct. 90, 57 L. Ed. 243) occurred almost entirely within the State of Pennsylvania; but it was intended to reach and did reach beyond the borders of that State, and it was held illegal. See *Chattanooga Foundry Co.* v. *City of Atlanta*, 203 U. S. 390, 27 Sup. Ct. 65, 51 L. Ed. 241; *Loewe* v. *Lawlor*, 208 U. S. 274, 28 Sup. Ct. 301, 52 L. Ed. 488, 13 Ann. Cas. 815; s. c., 235 U. S. 522, 35 Sup. Ct. 170, 59 L. Ed. 341.

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[4] The declaration does not explicitly and in the language of the statute allege a monopolizing or an attempt to monopolize. It does charge that "by means of such contracts the said defendant, the United States Rubber Company, illegally and unlawfully restricted, limited, and controlled the interstate and foreign sale and transportation of lasts" (count 1, par. 8). Trade necessarily involves both buying and [588] selling, and a complete domination of either side is a domination of the trade in question. Taking the declaration as a whole, it clearly alleges that the defendant acquired a complete and exclusive control of the selling trade in lasts for rubber footwear. It seems to me that the word "control," as used in the declaration, is the substantial equivalent of "monopolize," as used in the statute, and that by the contracts in question the defendant, upon the allegations of the declaration, obtained an illegal monopoly of the trade in lasts for rubber footwear. A cause of action is therefore stated under the second section of the statute. It should perhaps be noticed that the declaration was filed July 2, 1902, when the law on this subject was not so far developed as it has since become, and when the technical terms applicable to cases of this character were less certain than at present.

The demurrers of all the defendants except the United States Rubber Company should be sustained; the demurrer of the United States Rubber Company should be overruled.

So ordered.

UNITED STATES v. QUAKER OATS CO. ET AL.[a]

(District Court, N. D. Illinois, E. D. April 21, 1916.)

[232 Fed. Rep., 499.]

MONOPOLIES 24(2)—COMBINATIONS IN RESTRAINT OF TRADE—REMEDIES—EVIDENCE.—In a suit by the Government for an injunction under Anti-Trust Act July 2, 1890, c. 647, 26 Stat. 209 (Comp. St. 1913, §§ 8820–8830), evidence *held* not to show that a monopoly

[a] The case is pending in the Supreme Court on the appeal of the United States.

in fact was created by the purchase, by one company engaged in the manufacture and sale of package rolled oats, of the business of a competitor.[a]

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 17; Dec. Dig. 24(2).]

MONOPOLIES 12(1)—COMBINATIONS IN RESTRAINT OF TRADE—ATTEMPT TO MONOPOLIZE—INTENT.—Though no intent is necessary to establish a monopoly in fact, created by the purchase of a competitor's business, there can be no finding of an attempt to monopolize without proof of intent.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 10; Dec. Dig. 12(1).]

Alschuler, Circuit Judge, dissenting.

In Equity. Suit by the United States against the Quaker Oats Company and others for an injunction. On final hearing. Decree entered dismissing the bill for want of equity.

William C. Fitts, of Washington, D. C., and *Morgan L. Davies*, of Chicago, Ill., Sp. Asst. Attys. Gen., for the United States.

John P. Wilson, *John M. Zane*, and *Frank F. Reed*, all of Chicago, Ill., for defendant Quaker Oats Co.

Adams, *Crews*, *Bobb & Westcott*, of Chicago, Ill., for defendants Great Western Cereal Co. and Joy Morton.

Before BAKER, MACK, and ALSCHULER, Circuit Judges, sitting under expediting certificate.

BAKER, Circuit Judge.

The clerk is directed by the court to enter a decree dismissing the bill for want of equity.

This case has been brought here under the expediting act. The members of the court have deemed it well to enter the decree at once, without undertaking to prepare—use the time and create the delay that would be occasioned by making—written findings of fact and conclusions of law.

The decree is entered upon the votes of Judge MACK and myself, in favor of that decree, and against the vote of Judge

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Opinion of the Court.

ALSCHULER, who thinks there should be a decree for the complaint—the petitioner.

I will state very briefly my view of the facts and law of the case. At the conclusion the situation remained as it appeared to me upon the Government's own statement of what it claimed was the situation with respect to the evidence, and on the Government's statement of its views of the law. So far as my own disposition of the case was concerned, I was ready to dismiss the bill upon the Government's own showing, because, under section 1, there must be a con[500]tract, combination, or conspiracy in existence, in present force at the time the bill is filed. "Contract, combination, or conspiracy"—the collocation of words, of course, is influential, under familiar canons of statutory interpretation, in clearing and restricting each of the words; in short, necessarily they are all of the same genus. Now, when the Government admits, or is compelled to admit, that there was no cause of action against Morton or the Great Western when the bill was filed, there could be nothing except a decree of dismissal against all defendants, under section 1. If three men, for example, are indicted for conspiracy to ruin a bank, and the evidence shows that A. had the intent to ruin the bank and was performing acts to ruin the bank, and the evidence also shows that there was no conspiracy on the part of B. and C., then, of course, there would have to be a directed verdict in favor of all the defendants, because one man cannot be guilty of conspiracy. One man or one institution, however, may be guilty of creating a monopoly, or attempting to create a monopoly, and so, legally, the existence of any case here would be dependent upon a violation of section 2.

[1, 2] Without reviewing the evidence, to my mind it is clear that the finding of fact should be that there was no monopoly in fact. Of course, if there is a monopoly in fact (a monopoly by its terms, by the very inherent thought, to my mind indicates an exclusion of others), if there is an exclusion, the taking unto one's self, completely or so far near completion that it is effective, and a monopoly is created, then the intent is wholly immaterial. It would be the

fact of monopoly that would be determinative, and not the purposes or intents of the people creating the monopoly; but if no monopoly exists, there may still be an offense for which the remedies—the civil and injunctive remedies—of the statute may be appropriate, if there are acts which constitute an attempt to create a monopoly. But in the matter attempted, to my mind, the element of intent becomes essential. And so when I gathered from the Government's own case that there were three defendants, say A., B., and C., and there could be—there was at the time of filing of the petition—nothing chargeable against B. and C., there could not be anything chargeable against A., on the ground of "contract, combination, or conspiracy," which to my mind requires the act of more than one person; and when it became apparent that the Government was not claiming any monopoly in fact, but only the potentiality, that there could be no finding of any monopoly in fact. The attempt at monopoly brings in the question of intent; that is, looking over to see why everything was done; and in that respect, no wrongful intent was claimed. Therefore it occurred to me that the Government made no case.

MACK, Circuit Judge.

I feel it my duty under the circumstances of the division of opinion of the court to express my personal views in concurrence with Judge BAKER, possibly in some slight respects differing from the reasons which led him to the conclusion to which both of us agree.

I would say, in the first place, that the bill, of course, is very much broader and may well justify the enormous expenditure of time and [501] money that has occurred in this case—very much broader than the claim made on the final hearing, by the Government. If the bill had charged only what the Government now charges, and had sought only the relief that the Government now seeks, I take it that the case would have been ready for hearing in a comparatively short time, and with very much less expenditure. I say this, of course, not in any way as a criticism of the bill or the methods pursued, but as one of the reasons which it seems to me relieves the court of what otherwise might

Mack, C. J. concurring.

be its duty of a thorough and careful examination of the enormous record that has been presented here.

Then, in the second place, I believe the eminent representative of the Government, Mr. Fitts, was under some misapprehension as to the reason for calling on him after his associate had made a statement of facts. This is a hearing in the court of original jurisdiction, and I personally felt it the duty of the representatives of the Government, the plaintiff in the case, to present in the opening statement, not merely their version of the evidence, but also their view of the law itself, both for the enlightenment of the court and in accordance with the practice that prevails in this State, in order to give opposing counsel the opportunity to answer, and thereby avoid a response after the Government's counsel had answered defendant's counsel. It was for that reason, for the purpose of having the Government's views both as to the law and the facts fully presented, that I desired to hear from Mr. Fitts before hearing from the defense.

I agree, however, with Judge Baker, that after the Government had fully presented its case it seemed to me that neither by the facts nor under the law were the contentions of the Government established. While the views expressed by Judge Baker as to the meaning of the word "combination" are supported both by the collocation, the phrase being "contract, combination or conspiracy," and by the usage of the word at the time the act was passed, certainly it may well be—and it is unnecessary now for me to express my personal opinion on the question—it may well be that the word "combination" is much broader and more significant, and I shall assume that the contention of the government is entirely sound. I do not mean to express any personal dissent from this contention that there may be, within section 1, a combination, not of persons, but a combination of the instrumentalities of commerce, and that when one man combines within his ownership competing instrumentalities of commerce with the intent or with the effect thereby unduly to restrain trade, and that ownership continues and the combination continues, that such combination may be enjoined.

Mack, C. J. concurring.

If that be the correct definition of "combination," then of course the purchase by one dealer in rolled oats of any part of the business or any of the instrumentalities of the business of the other dealer in rolled oats, is a combination, and beyond all question all combinations restrain trade.

But the question is whether it is an undue restraint of trade, and that depends upon the entire situation, the nature of the business, the competing elements throughout the region of interstate commerce—the possibilities of further competition. Furthermore, and without [502] expressing an opinion now as between the majority and the dissenting judge in the *Harvester case* ([D. C.] 214 Fed. 987), inasmuch as that case is pending in the Supreme Court, and assuming, and again without intimating any personal dissent—assuming that the majority in the Harvester case is absolutely and entirely right, and assuming, further, that both an undue restraint of competition and a monopolization in business may arise, where the situation is such that, without any wrongful acts of any kind, one man or one company has it within his power, by reason of the combination, or by reason of the transactions which lead to the existence of that power, unduly to restrain competition or to monopolize the interstate commerce, I fail entirely to find on the facts as presented by the government, supplemented by the presentation of the defense, either an actual monopoly, or that power which, in view of the entire situation of the rolled oats business, tends to show the existence of the possibility of monopolizing or unduly restraining the trade in rolled oats. It seems to me that the subject-matter is not Quaker Oats and Mother's Oats, but rolled oats.

Assuming even that it is not rolled oats, but package oats, rolled oats as sold by the trade throughout the country in packages for retail consumption, that being the largely prevailing method of conducting the business, there is, on the facts, to my mind, no undue restriction of competition, and not in the slightest degree a monopolization of the product of the business, and that because of this, that while the Quaker Oats Company and the Great Western were the two largest factors in the business, there were numerous

competitors, and there was the fullest possibility of the most extended competition, and the size and the power of neither of these companies, either single or combined; that is, the power of the Quaker Oats, after securing the Mother's Oats, were not such as could prevent the most unlimited competition in package rolled oats. The strength of both of these companies was due to the tremendous advertising of their brands. By virtue of that advertising the public had come to demand, not merely rolled oats, not package rolled oats, but Quaker rolled oats, or Mother's rolled oats, and yet the instrumentalities of satisfying the demands of the public, the wholesale business throughout the country, the retail business throughout the country, was all in most strenuous opposition to and competition with these two companies. The very elements that they necessarily utilized in the distribution of their product were their own chief competitors.

I do not speak now of the fact that the business concededly was in all respects legitimately conducted. That is not determinative. I agree with the Government that a potential monopoly that has failed to exercise its tremendous power, and has become and has been a very good trust, is none the less subject to the law; but we must first find the undue restraint of competition, or the probability or possibility thereof. The very fact that the subject-matter of the competition in rolled oats was a product manufactured without the slightest difficulty, without the slightest hindrance, by reason of any patents, either in the product or machinery for manufacture, from [503] a raw material of which the supply for all practical purposes was absolutely unlimited, and to be had in all parts of the country—a supply of which the rolled oats represents may be 1 or 2 per cent—that with very small capital, as testified to here, $25,000 to start a small mill, and $65,000 to start a 500-barrel capacity, anybody could go into that business, negatives undue restraint. Now, it is true that anybody that went into the business and attempted to sell to the public package rolled oats would run up against the tremendous advertising power, against the tremendous advertising value of Quaker Oats and Mother's Oats; but competition could be established, and it has

Mack, C. J. concurring.

been established, and that which has existed all along is none the less real. The fact that one of the competitors, or two of the competitors, or one competitor combining the two competitors, has acquired a preponderance in the business of the package rolled oats, due to a tremendous expenditure for advertising, to my mind does not show that thereby there has been any undue restriction of competition. In no sense has the competition been restricted, so far as I have been able to comprehend, by the union of Mother's Oats and Quaker Oats as against the rest of the world.

It is true that by the combination of ownership there may be a restriction of the competition between the two brands of rolled oats, Quaker Oats and Mother's Oats; but there is no restriction—no country-wide restriction—of the competition, and no possibility thereby of creating a country-wide restriction of competition in rolled oats, or in package oats. Every wholesaler in the country is competing, and competing hard, and, so far as the evidence as presented to us shows, is competing successfully, in the package trade. It is true the Quaker Oats Company is prospering, and prospering tremendously, notwithstanding this competition. That is due to its past, present, and continuing advertising. If that advertising is causing a misapprehension on the part of the public, there are other remedies to correct that misapprehension. If the Quaker Oats Company is falsely asserting its claims, there are other methods of correcting their false statements. I do not for a moment say that it is; I merely assume that possibility.

Now, the Government has urged that the real wrong is in the combination of these advertised brands in one hand, and that the contract which effectuated that condition is illegal. While on the facts presented it seems clear that the Quaker Oats did not go out with any intent to destroy the Great Western, to buy it off, and while it seems clear that the Great Western was anxious to sell out because of its actual insolvent condition, I do not think that that affects the question, either under section 1, or under the monopolization clause of section 2. The intent with which the Quaker Oats purchased Mother's Oats would be important only in the

consideration of a violation of the prohibition against attempting to monopolize. So that for the purposes of this case, for the purposes of the consideration of the violation of section 1, and of the first part of section 2, the creation of an actual monopoly, it seems to me immaterial whether the Great Western came to the Quaker Oats, or whether the Quaker Oats went to the Great [504] Western. I should reach the same conclusion, even if the Quaker Oats had gone to the Great Western, for the very purpose of acquiring Mother's Oats and thereby lessening the competition. Every purchase between two people in the same business, one buying out the other, is necessarily a lessening of the competition; but as long as the property is such that the fullest opportunity for country-wide competition exists, the field being open to everybody with but small capital, there being no patent rights, there being no other hindrance to the freest development of individual enterprise, I fail to see anything undue, anything unreasonable, in the restriction of competition that results, although it be the largest of the several competing firms that buys out the second largest.

For that reason, I concur in the order dismissing the bill.

ALSCHULER, Circuit Judge.

I cannot concur in the conclusion of the majority of the court, nor, of course, in some of the reasoning whereby that conclusion was reached. It was, and I think properly, deemed wise to expedite this case by announcing the decision as soon as it was reached, without waiting for the ordinarily longer process of preparing written opinions.

At the time of making the contract of purchase of which the Government complains, of the total rolled oats output in and for the United States, the Quaker Oats Company had, roughly speaking, 55 per cent, the Western Cereal Company between 15 and 20 per cent, and the remainder, divided in various proportions between something over a dozen others who were in the same business, the largest of them quite small in comparison with the Western. About half the Quaker output was of package goods under the advertised brand of "Quaker Oats," and a much larger

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proportion of the Western product was put out under the advertised brand of "Mother's Oats."

Competition in the market between these two brands was keen. Quaker had lost some ground in 1910 and 1911, and Mother's had rapidly gained in volume. The Quaker Company showed large profits, while the Western was running behind financially. There was much evidence as to the cause for the losses of the latter, the Government claiming it was improper conduct of its officers; but to my mind this is quite immaterial to the issue here involved, particularly as it is not charged that the Quaker interests were instrumental in bringing about such conduct, if any there was.

The two companies themselves were composed of various units which had theretofore been brought together, the manner whereof could not be related in small compass; but suffice to say that even if, as claimed by the Government, this was in some respect obnoxious to the law, these long-existing associations and combinations, culminating in these two major companies here involved, are not attacked by the bill, but it is sought only to affect thereby the contract of June 21, 1911, under which the Quaker acquired certain properties of the Western.

Without reviewing the voluminous details of conditions and negotiations leading to the contract, it seems clear to me that both parties to it contemplated that the Great Western should permanently with[505]draw from participation in the rolled oats business. This is strenuously denied by the defendants, but it seems to me that the circumstances, to which I will refer very briefly, could lead to no other conclusion than that this was the purpose and intent of the transaction.

The directors' and stockholders' resolution adopted by the Western authorizing the transaction distinctly set out its purpose, in reciting that in the judgment of the board of directors it was for the best interests of the company to discontinue the manufacture of oatmeal, rolled oats, and crushed oats. The defendants contended that this was but a form that was adopted to assure the trustee of the mortgage

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or trust deed covering the real estates contracted to be conveyed that it would have the power under clauses of the trust deed to make a conveyance of property that was no longer of use to the company. But the contract itself seems to dispel all doubt on the subject. It provides primarily for the conveyance of two plants of the Western, one at Joilet and one at Ft. Dodge, but not of several other plants which it possessed. After providing for the conveyance of these two plants, and for all of the property contained therein, the fifth section conveys:

"All and singular the business, good will, contracts for sales, formulas, processes, trade secrets, copyrights, trade rights, trade-marks, trade-names, trade insignia, both registered and unregistered, and all registrations and certificates of registration, at home and abroad of any such trade-marks, trade-names, and trade insignia, etc., relating to or in any way connected or associated with the manufacturing, putting up, packaging, and sale of oatmeal, rolled oats, crushed oats, and commercial mixed feed, possessed or controlled or claimed by the party of the first part" (which is the Western).

It includes all, whether of the two mills specifically conveyed, or any other of the various mills in which it was theretofore manufacturing oat products. And in clause 7 the first party, the Western, covenants and agrees at once to turn over and deliver to the Quaker Company complete enjoyment of all such business and good will and trade-marks and the like, and that it will not directly or indirectly interfere with the use and enjoyment thereof by the Quaker Company, nor use or authorize others to use the same. All labels, advertising materials, and premiums, boxes, and cartons are included, and the eleventh section provides that for the same consideration (which is stated in the instrument to be $10 and other good and valuable consideratoin, but which in fact was a little over $1,000,000) for which the plants at Joilet and Ft. Dodge are conveyed, the enumerated intangible things are also conveyed. Section 14 provides that the first party shall turn over all contracts for the oat products of the business of which the good will and trade-marks are sold, and a list of all the customers which the first party has in the oat product business.

Included in the sale there was also, for another consideration, being the appraised price thereof, all of the product on

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hand and all of the materials for the manufacturing of these products, in all of the mills and plants of the Western, not alone those at Joliet and Ft. Dodge. The appraised price paid for all of such products and materials was upwards of $400,000. This parting with its business, [506] good will, contracts, customers, marks, brands, advertising matter, stock, and materials, and stripping itself of the very essentials for building up and holding its immense trade, manifests an intention on the part of the seller permanently to retire, and upon the part of the purchaser that the seller shall so retire, from the oat product business in any form. The retention by the Western of its other plants, so far as indicating, as claimed, an intention to continue in this business, must have reference to the products of grains other than oats, in the manufacture of which other products both of the companies were then and theretofore heavily engaged.

Considering the relations of these companies toward each other and toward the trade and the public, and attaching to the contract that probative value which common observation and ordinary experience will give it, I cannot escape the conclusion that the contract is violative of the statute. The controlling fact seems to me to be that the Quaker Oats Company, already through its domination of the major part of the entire output, in this advantageous position, took over the property of its largest competitor, whereupon the latter with its remaining mills ceased longer to be a factor in the oatmeal trade. That as the result of this acquisition the Quaker Oats Company did or could materially control or affect the raw product, the oats, is not reasonable to suppose; that the competition in the bulk rolled oats has not been appreciably affected since the contract may be said to be fairly established by the evidence. That by the added power of the Quaker Company, through its absorption of this its most potent competitor, it is in greatly improved position to seriously affect the trade through price manipulation of such goods, or other action easily possible with such power, is to me self-evident.

Although, as it was testified, $50,000 might build a fair-sized mill, the existence of this single powerful unit would

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be a strong deterrent to such an undertaking. But that the transaction in question did remove the strong competition theretofore existing between the Quaker Oats and Mother's Oats brands, in each of which the respective companies had theretofore built up a vast trade, totaling far more than that of all others combined, is but another way of stating that the contract in question was consummated, for this was its necessary as well as its intended effect.

It is not tenable to say that in this transfer of the trade-marks, brands, and good will, rather than of tangible property, there was manifested no intent or tendency to monopolize trade in the product. The trade-marks and brands constitute the effective instrumentalities whereby a great trade was built up, and that there was real competition in these advertised goods would appear, not alone in the very nature of things, but in the fact that, as a probable result, the Quaker Oats brand output had somewhat declined, while the Mother's Oats was rapidly on the increase. True the price of Quaker Oats package goods has not been increased, but this is not essential to the establishment of the existence of monopoly or of undue restraint of trade. If the Quaker concern has thereby better intrenched and secured itself against successful competitive attack, the tendency to trade restraint [507] and monopoly is apparent, and the law may be thereby, and, in my judgment, under the circumstances shown, has been transgressed. If the competition in package goods had been maintained, the Quaker might have lowered its prices, or done something else disadvantageous to itself and of advantage to the buying public, in order to maintain its commercial status. To say that people may buy the unadvertised or bulk product, which is equally good, at much lower prices, seems to me to be beside the question. It is not for the courts to tell the people what they may or shall buy.

If these companies have exploited their respective brands so successfully that the public by the hundreds of thousands have been induced to believe that they possess superior merit, and thereby the companies, respectively, have established this vast package trade in these goods, if, then, in

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some way they combine, or one sells to the other, for the advantage thereby accruing, and in such manner they unduly restrict trade and promote monopoly in these products, they ought not, in defense of such transaction, be heard to say that, if the public do not like it, they may get goods of other brands or go without any brand at all. That the great trade has been established in these particular goods through advertising does not in my judgment affect the proposition. The fact that through judicious and successful advertising two concerns each secure a vast trade, equal or greater than the other combined similar trade of the country, does not of itself authorize the two to unite to eliminate the competition between them. It is to the credit of the Quaker Company that it does not appear to have resorted to those coercive and terrorizing tactics for increasing or maintaining its trade so often found to be the case where a business establishment has obtained the comparative ascendency and power of this one; but in my judgment this does not obviate the apparent undue restraint or attempted undue restraint of trade, which the entering into this contract seems to me to manifest.

There was for the defendants evidence to the effect that the real thing which was the subject of the purchase was the brands, trade-marks, and good will of the Western in the oatmeal trade, and that the tangible property was taken only as an incident, because deemed essential to secure title to the intangibles, such as brands, trade-marks, and good will. If for this $1,000,000 or so of consideration, the Quaker Oats had obtained oats and machinery and real estate and other facilities for maintaining and enlarging its business and plant, things which might be purchased elsewhere, it might with better grace maintain that there was nothing in the transaction that tended to destroy competition and create monopoly. What did it buy for its $1,000,000 of investment? It is clear to me that it purchased the business extinction in the oat-product trade, and the commercial status therein, of its greatest and most powerful rival, thus strengthening the purchaser's already strong grasp upon the entire industry, through the added force of

this very considerable unit, thenceforth joined with its own. To my mind, this of itself, quite regardless of the manner in which this enlarged power has been exercised in the interim between the making of the contract and the filing of the bill, manifests in the [508] contract such an undue restraint of the interstate trade and commerce thereby affected, and such a purpose and tendency to monopolize, as comes fairly within the condemnation of the statute, a statute which denounces, not commercial growth, nor strength, nor power, nor proportion, but only combination or device, by whatever form they may appear, calculated and tending unduly to restrain interstate trade and commerce, or to eliminate competition, and, in the words of the statute, "to monopolize any part of the trade or commerce among the several States."

Entertaining these views, I believe there should be a decree for the Government, the precise scope of which, under the circumstances, it is hardly necessary for me to discuss.

UNITED COPPER SECURITIES CO. v. AMALGAMATED COPPER CO. ET AL.

(Circuit Court of Appeals, Second Circuit. April 11, 1916.)

[232 Fed. Rep., 574.]

APPEAL AND ERROR 870(5)—REVIEW—DECISIONS REVIEWABLE.—As there can be no writ of error until after final judgment, and as orders sustaining demurrers to the complaint, which necessitated plaintiff's pleading anew, are a part of the record, such orders will be reviewed on writ of error, after judgment dismissing the complaint.[a]

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3496, 3506–3508; Dec. Dig. 870(5).]

EXECUTORS AND ADMINISTRATORS 444(1)—COMPLAINT—SUFFICIENCY.—Where it was sought to hold executors liable for the acts of their decedents, the complaint is not objectionable because charging them in their representative capacity.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1813, 1814, 1837–1841; Dec. Dig. 444(1).]

MONOPOLIES 28—COMPLAINT—SUFFICIENCY.—In an action under Sherman Act, July 2, 1890, c. 647, § 7, 26 Stat. 210 (Comp. St. 1913,

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§ 8829), for treble damages for a conspiracy in restraint of trade between defendants' testators and others, the dates of the death of the decedents, as well as of the accomplishment of the conspiracy, should be pleaded.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 18; Dec. Dig. 28.]

MONOPOLIES 28—ACTIONS—PLEADING.—In an action under Sherman Act, § 7, for damages resulting to individuals from a conspiracy to injure them and also certain corporations in which they were stockholders, allegations as to the conspiracy against the corporations are proper, although the individuals could not recover for the corporate injury.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 18; Dec. Dig. 28.]

MONOPOLIES 28—ACTIONS—DEFENSES.—In an action under Sherman Act, § 7, for injuries resulting from a conspiracy to perfect a monopoly, it is immaterial that the person injured [575] was not engaged in interstate commerce, it being sufficient if such person was directly affected.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 18; Dec. Dig. 28.]

STATUTES 222—FEDERAL STATUTES—CONSTRUCTION.—Where there is no statutory provision to guide it, a Federal statute must be construed with reference to the common law existing prior to the Declaration of Independence, there being no Federal common law.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 301; Dec. Dig. 222.]

ASSIGNMENTS 26—ACTIONS ASSIGNABLE—MONOPOLIES.—A right of action for property injuries, based on a violation of the Sherman Act and brought under section 7, is assignable; the action being a civil action, which could be assigned at common law.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. §§ 48-52; Dec. Dig. 26.]

ABATEMENT AND REVIVAL 57—SURVIVOR OF ACTIONS—MONOPOLIES.—Where recovery for the results of a monopolistic conspiracy is sought under Sherman Act, § 7, the action will survive against the estate of decedent, in case he secured some benefit at the expense of plaintiff.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. §§ 286-293; Dec. Dig. 57.]

Learned Hand, District Judge, dissenting in part.

In error to the District Court of the United States for the Southern District of New York.

Action by the United Copper Securities Company against the Amalgamated Copper Company and others. The com-

plaint was ordered dismissed, and plaintiff brings error. Reversed and remanded.

F. E. M. Bullowa, of New York City, for plaintiff in error.

Louis Marshall, of New York City, for defendant in error Adolph Lewisohn.

Shearman & Sterling, of New York City (*John A. Garver*, of New York City, of counsel), for defendants in error Amalgamated Copper Co. and others.

Hoadly, Lauterbach & Johnson, of New York City (*Edward Lauterbach*, *Alfred H. Townley*, and *Henry Siegrist*, all of New York City, of counsel), for defendants in error Frederick Lewisohn and others.

Before COXE and WARD, Circuit Judges, and LEARNED HAND, District Judge.

WARD, Circuit Judge.

This is a writ of error to a judgment dismissing the complaint in an action to recover treble damages under section 7 of the Sherman Act. Owing to orders made from time to time sustaining objections to the successive complaints, the one dismissed, the third amended complaint, was the fourth in number served.

[1] As the plaintiff was compelled to plead in accordance with these orders, from which there can be no writ of error in the Federal court until after final judgment, and as they are a part of the record brought up by the writ of error, we must consider the assignments of error made in respect to them.

[576] [2] The complaint charged a conspiracy entered into by certain decedents in their lifetime and by their executors after their death. The court by order of February 14, 1914, directed the words charging the executors to be stricken out wherever they occurred. This was right, so far as the charge against them was for their own acts, but

not so far as it was attempted to hold the estate of their testators liable. The pleader should have charged the executors officially for the acts of their testators and individually for their own acts.

[3] The same order required the plaintiff to state the dates of death of the decedents and the date of the accomplishment of the conspiracy or conspiracies charged and of the incorporation of the defendant the Amalgamated Copper Company. We think that the defendants were entitled to these particulars.

[4] By order of the same date the court directed allegations to be stricken out of the complaint as to the value of the stock of the United Copper Company and to the effect that there was an interstate traffic in the securities of copper companies, especially of the copper companies in which the defendants and the assignors of the plaintiff were respectively interested, and that in some of them the plaintiff's assignors had controlling interests, whose value depended upon unrestricted competition. We know of no such business as interstate traffic in copper securities, and think that any injury done was an injury to the corporations, to be asserted by them. Nevertheless we think the allegation of a conspiracy to destroy certain copper companies, for instance, the United Copper Company and the Montana Ore Purchasing Company, was properly pleaded as proof of the conspiracy whereby the plaintiff's assignors were injured, notwithstanding that they were interested as stockholders of the companies and could not recover damages for corporate injuries.

The court also ordered allegations to be stricken out to the effect that the defendants had attempted to bribe and then subsequently threatened a judge, and had caused the works of one of the copper companies in which the plantiff's assignors were interested to be set on fire and the water supply intended to protect it to be cut off. These allegations were certainly relevant to the charge of a conspiracy, and, if the plaintiff expected to prove such facts at the trial, it was very proper in it to give notice of them. We do not, however, understand that the court intended that the alle-

gations should be entirely stricken out, but only that they should be made against such of the defendants as the plaintiff intended to charge. There seems to us no error in this.

By order of May 18, 1914, the allegation that the plaintiff had acquired the cause of action of Arthur P. Heinze as trustee of certain securities was properly stricken out, because such a cause of action, if any, was a corporate one. The other particulars which the court required the plaintiff to state we think were properly ordered.

We think the order of July 30, resettled September 17, 1914, was proper.

[5] The foregoing, we think, will sufficiently indicate what amendments the plaintiff may make to its present complaint, if it apply for leave to do so to the court below. The judge of the District Court, on [577] defendant's motion, struck out the third amended complaint, apparently on the ground that plaintiff's assignors were not engaged in interstate commerce, and also that plaintiff's theories as to its cause of action might be tested in this court before trial. There is nothing in the Sherman Act confining the right to recover under section 7 to persons engaged in interstate commerce, or whose business or property injured is interstate commerce. If there were a doubt on the subject, it would be instantly laid by in the case of *Chattanooga Foundry & Pipe Works* v. *Atlanta*, 203 U. S. 396.[a] The person injured must be engaged in a business directly, or at least not remotely, affected by the conspiracy complained of. One who had rented offices to corporations absorbed by an illegal combination could not recover for losing them as tenants, nor a lawyer regularly retained for losing them as clients. But here the pleader set up that the defendants, as a part of their conspiracy to monopolize the copper market, intended and designed to destroy the business, financial standing, and credit of the plaintiff's assignors, who were alleged to be engaged in organizing, promoting, and financing companies for mining, dealing in, and shipping copper, some of them being the very corporations which the defendants conspired

[a] 27 Sup. Ct. 65, 51 L. Ed. 241.

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to acquire. We have no doubt that a good cause of action is stated in the complaint.

[6-8] The serious questions are: First, was the cause of action assignable, so that this plaintiff may maintain the suit? And, second, did it survive as against the estates of deceased persons? There being no Federal common law distinct from the common law of the States (*Smith* v. *Alabama*, 124 U. S. 478, 8 Sup. Ct. 564, 31 L. Ed. 508), a Federal court, in construing a Federal statute such as that before us, where there is no statutory provision to guide it, must refer to the common law existing at the time of the Declaration of Independence. This was done on a question of evidence in *Moore* v. *U. S.*, 91 U. S. 271, 23 L. Ed. 346. And in *Schreiber* v. *Sharpless*, 110 U. S. 76, 3 Sup. Ct. 423, 28 L. Ed. 65, a suit to recover penalties for infringement of copyright, the plaintiff sought to bring in the executors of the defendant, who had died pending the suit. The subject was regulated by a Federal statute, section 955, Rev. St. U. S. (Comp. St. 1913, § 1592), providing that the representatives of plaintiffs or defendants who have died before final judgment may be brought in as parties when the cause of action survives at law. No Federal statute defining what actions should survive, the question was to what law must the court resort. It referred at once to the common law, and finding that under it actions for penalties did not survive, held they did not survive under the copyright law. There can, of course, be no pretense that section 7 of the Sherman Act provides a penalty. It awards civil damages, which are made exemplary by virtue of being trebled.

It must be admitted that at common law the maxim "Actio personalis moritur cum persona" was literally enforced. It was first limited by the remedial statute of 4 Edward III, c. 7, de bonis asportatis in vita testatoris, which gave executors the same right of action for trespasses to his personal estate that the decedent had. Sergeant Williams wrote a valuable note on the case of *Wheatley* v. *Lane*, 1 Saunders, 216(a). He said, following *Emerson* v. *Emerson*, 1 Ventris, 187, that though [578] the word used in the statute was "trespasses" it had been "expounded largely" and extended

to other cases within the equity—that is, the meaning and intent—of the statute. An instance is *Rutland* v. *Rutland*, Croke's Reports (Elizabeth) 377, in which it was held that executors could maintain trover under the statute, and in *Williams* v. *Carey*, 4 Modern Reports, 403, an executor's action against a sheriff for a false return was held to be for an injury to his decedent's personal estate within the equity of the statute. This broad construction was recognized in *Twycross* v. *Grant*, 4 C. P. D. 40, and *Hatchard* v. *Mege*, 18 Q. B. D. 771. The injury complained of is to the estate of the plaintiff's assignors and not to them personally. Our examination of the common law justifies us in finding that this cause of action is assignable.

We come to this conclusion willingly, because it would seem to be most inequitable that the representatives of an individual or of a corporation whose business has been wrongfully destroyed shall be denied all remedy because of the death or corporate dissolution of the party they represent.

The second question is more doubtful, but it was held in *U. S.* v. *Daniel*, 6 How. 11, 12 L. Ed. 323, an action against the executors of a sheriff for a false return, that such a cause of action, being ex delicto, would not survive against executors, unless the decedent secured some benefit at the expense of the sufferer. This exception will be a matter of proof, and is not a reason for striking the executors out as parties.

The judgment is reversed.

Learned Hand, District Judge.

I concur, except that I think we should not review the earlier orders. Such orders as those making pleadings more definite and certain, or numbering the causes of action separately, or granting bill of particulars, should under no circumstances come before this court; they do not involve any final decision on substantial rights and should be within the power of the court which prepares the cause for trial. An order striking out an allegation from a pleading may, however, go to the merits of the case, and in such

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a case should be reviewable. If, for example, in the case at bar the third amended complaint had been sufficient, but only because of some allegation struck out in one of the prior orders, the correctness of so much of that order should be raised. However, the third amended complaint was sufficient as it stood and it is not necessary to consider whether any allegations struck out earlier were material or not. If any of those allegations were erroneously stricken out, the plaintiff may still offer the proof on the trial and take an exception to its exclusion. Such an exception will raise not only the technical validity of the order but, what is much more important, whether the proof excluded was of enough consequence to affect the result; the question will come up like any other exception to the exclusion of evidence. As the case now comes up the orders striking out the allegations are moot, and should not be decided. The question whether by accepting the privilege of amendment conferred by the orders striking out, the plaintiff waived any right to appeal, was not urged upon the argument; it should not be decided, in my judgment.

UNITED STATES *v.* AMERICAN CAN CO. ET AL.[a] [b]

(District Court, D. Maryland. February 23, 1916.)

[230 Fed. Rep., 859.]

MONOPOLIES 20—COMBINATIONS IN RESTRAINT OF TRADE—SUIT FOR DISSOLUTION.—Defendant American Can Company was organized in 1901 with capital stock, common and preferred, of $88,000,000, $78,000,000 of which was issued to the promoters in payment for 95 plants which made probably 90 per cent of the cans then manufactured for sale in the United States and options on which had been secured by the promoters. They paid for the plants in cash or its equivalent in stock at one-half par value $23,500,000. New plants with new machinery of equal capacity could have been built for not to exceed $10,000,000. For some of the plants they paid

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[a] For opinion on the form of decree (234 Fed. 1019), see *post*, page 518.

[b] The case is now pending in the Supreme Court on the appeal of the United States.

Statement of the Case.

many times the value of the physical property. They also required the sellers if individuals, or if corporations their officers, to sign agreements not to again engage in the business for 15 years within 3,000 miles from Chicago. Defendant also acquired patents on can-making machinery and made contracts with the principal manufacturers of the best machinery intended to prevent others from buying it for a term of years. During the first year, defendant largely increased prices; but, the effect being to induce others to enter the business, it abandoned the policy. About two-thirds of the plants purchased were closed. By the end of 12 years, when the Government brought suit for its dissolution, defendant was perhaps marketing no more cans than the aggregate of its competitors. For some years before the suit, defendant did not attempt to do away with competition, or to monopolize the business, but its methods and prices were fair and its standing good with customers and competitors. The most of the concerns absorbed by it and of others afterward acquired went out of existence. *Held*, that the organization and early methods of de[860]fendant were intended and calculated to restrain competition in the manufacture and sale of cans, and to monopolize the same, and were clearly illegal as in violation of Sherman Anti-Trust Act July 2, 1890, c. 647, §§ 1 and 2, 26 Stat. 209 (Comp. St. 1913, §§ 8820, 8821); that while its large capital and business make it a potential instrument which may be used to restrain or monopolize a part of the commerce among the States, so long as no attempt is being made at present to so use them, and in view of the fact that former conditions cannot be restored, and that under its present methods by reason of its widespread business, packers are enabled to make more beneficial contracts for the purchase of cans for future use, both from it and its competitors, than ever before, no public interest would be served by its dissolution, but that such interest would be better served by permitting the suit to stand open for such future action as changed conditions may require.[a]

[Ed. Note.—For other cases, see Monopolies, Dec. Dig. 20.]

In Equity. Suit by the United States against the American Can Company, the Sanitary Can Company, the Missouri Can Company, the Martin Wagner Company, the Boston Wharf Company, the Max Ams Machine Company, the Freeman-Duncan Transfer & Realty Company, the Hawaiian Pineapple Company, Limited, the American Sheet & Tin Plate Company, Daniel G. Reid, Fred S. Wheeler, Henry W. Phelps, Franklin Rudolph, Rensselaer H. Ismon, W. F. Dutton, Roy A. Burger, Frank D. Throop, William T. Graham,

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Edmund C. Converse, Francis L. Hine, James McLean, George C. McMurtry, William Henry Moore, Joseph W. Ogden, Ray L. Skofield, J. Hobart Moore, William Y. Bogle, George W. Cobb, William A. Wagner, Edward A. Kerr, Frederick W. Wagner, Charles M. Ams, Emil Ams, Joseph B. Russell, William G. Duncan, and Michael Espert. On final hearing. Decree deferred.

George Carroll Todd, Asst. Atty. Gen., *Henry E. Colton* and *William T. Chantland*, Special Asst. Attys. Gen., and *Samuel K. Dennis*, U. S. Atty., of Baltimore, Md., for the United States.

John Barton Payne, of Chicago, Ill., *George R. Willis*, of Baltimore, Md., *L. A. Welles*, of New York City, and *Frederick R. Williams*, of Baltimore, Md., for defendants.

ROSE, District Judge.

The United States, hereinafter called the "Government," brings this proceeding under the fourth section of the Anti-Trust Act of July 2, 1890. It says that the American Can Company, a New Jersey corporation, was formed and has since been maintained in violation of the first and second sections of that statute. Originally there were 9 other corporate and 27 individual defendants. By consent at the hearing the petition was dismissed as to 5 of the former and 8 of the latter. All of the defendants other than the American Can Company were brought into the case because the Government thought they had taken part, either in its illegal organization, or in its subsequent unlawful acts. It will be referred to many times. The other defendants will be mentioned much less frequently. For brevity, it will be called the "defendant."

It has put 516 witnesses on the stand; the Government 346. Between 1,500 and 1,600 exhibits have been filed. The record covers more than 8,700 printed pages. Nevertheless, an ordinary collision [861] case on the admiralty side of the court, or a moderately contested proceeding in bankruptcy, would raise more issues of fact.. The Government proved one set of circumstances. By cross-examination the defendant sought to minimize their effect, but it offered no evidence in con-

tradiction. When its turn came, it proved other things. The Government attempted to show from defendant's witnesses that, either they were not as well informed as they supposed themselves to be, or that there were many things in economics undreamt of in their philosophy; but, as a rule, it did not undertake to show that they were wrong as to any actual fact of real materiality or importance.

WHAT HAS BEEN PROVED.

What has been proved is: First, that the defendant was organized to monopolize interstate trade in cans, and to attain that object such trade was unlawfully restrained by it, and by those who formed it and directed its earlier activities, and that some of those individuals still participate in its management and control. Second, for some time before the filing of the petition in this case, it had done nothing of which any competitor or any consumer of cans complains, or anything which strikes a disinterested outsider as unfair or unethical.

LEGAL CONTENTIONS OF THE PARTIES.

The Government says that certain restraints once illegally imposed by the defendant upon the trade are still in force, in part at least. The defendant replies that, if in any sense so much is true, such restraints have long ago become theoretical rather than real, and, if the court thinks it worth while, the defendant has no objection to their being declared illegal, or even to an injunction forbidding their further enforcement.

The real controversy between the parties goes much deeper. The Government says the defendant, by its size, its wealth, and its power, exerts a great influence upon the entire trade in cans, and that this influence, in some very important respects, notably as to the fixing of the price of packers' cans, is so great that it may, without straining words, be said to dominate the market.

The defendant answers its size is not a crime. The Government replies, in substance:

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"True, provided such size is the result of natural and legitimate growth, but not when it is the outcome of unlawful means used for the very purpose of securing a control of the market. In the latter case, so long as the control continues, the illegal purpose is still in process of execution, and, if nothing short of dissolving the defendant into a number of smaller companies will completely emancipate the trade, the court must decree such dissolution."

"The combination among the once independent concerns might have been otherwise effected. They might have subjected themselves to control of a single will, while each still preserved its individual existence. In that event, it would be clear that the court could and should put an end to the agreement among them."

Reference is made to those cases which hold that the way in which the combination is brought about is immaterial. If it seeks an end forbidden by the Anti-Trust acts, and that end is attained in whole or [862] in part, the Government has a right to demand that it be dissolved.

The defendant's answer may be thus summed up:

"With a very few exceptions, only one of which is of any real importance, all the units which have at any time come under its control are dead, beyond the hope of resurrection. The court cannot call back to life the many can-making concerns which died that the defendant might come into being, or which have since yielded up their lives to it. No order of court can make the dead breathe again."

"The number of once independent concerns absorbed by it can, it is true, be ascertained. If the court is bound to come as near as it can to putting things back as they were, it must dissolve the defendant into a like number of parts. Everybody feels that it is under no such obligation. The Government does not ask that the defendant shall be divided into more than about half a dozen separate corporations. Why will it be content with a dissolution perhaps one-twentieth as drastic as would be required to restore the original status? Obviously, because it recognizes that a court of equity neither will, nor should, cause loss, destruction, or inconvenience, unless it has reasonable and probable grounds to believe that by so doing it will accomplish affirmative good. Its business is to prevent and remedy, not to punish. If it will not order a dissolution into 100 parts because nothing would be gained thereby, it will not decree a division into 6 or even into 2, unless it believes that good will follow. It must deal with facts as it finds them. If an illegal agreement is still in force, it must end it. If the agreement has long since been executed, and is itself at an end, the court may, if it can, put things back where they were before the agreement was made; but, if Humpty Dumpty cannot be set up again, the court must do

the best it may with conditions as they are. The record shows that any dissolution will do more harm than good."

To this the Government replies that:

"Even if, for the sake of the argument, the soundness of defendant's statement of legal principles should be admitted, it remains true that defendant acquired its controlling position in the trade as the result of an unlawful combination; that such control, even when legitimately acquired, if not illegal, is at the best a danger; and that, by the dissolution asked for, it can and should be ended."

WHY THE FACTS ARE REVIEWED.

It is upon the answers which the law requires to be given to these contentions that the judgment of this court must turn. Any statement of facts, in addition to that already made, other than those which bear upon the present relation of the defendant to the can trade, and upon the probable effect of its dissolution, or of its remaining undissolved, upon the public interests, is therefore, strictly speaking, unnecessary. The case may not stop here. It is not probable that either side will accept the conclusions above stated as being at once both accurate and complete. The court of first instance should give the appellate tribunal the benefit of its examination of the evidence whenever the facts are disputed or the inferences which should be drawn from them are contested.

Moreover, the history of the formation of the defendant, and of its subsequent conduct, of its effect upon its competitors, actual or potential, and upon the first and upon the ultimate consumers of cans, may be of far-reaching social and economic interest. All the 18 volumes of the record have been carefully studied to make sure what were the real issues in this case. It will be worth while to summarize the story they tell.

[868] PACKERS' CANS AND GENERAL LINE CANS.

The can-making trade has always made a distinction between cans for hermetically sealing food products and cans for other purposes. They call the former packers', the latter general line, cans. Almost all packers' cans are now made of

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certain standard shapes and sizes, which are, or which are intended to be, the same, no matter from what shop they come. On the other hand, general line cans are of every variety, shape, and size, according to the use to which they are to be put, and the taste of him whose goods are to go in them.

There have therefore always been more customers for machinery for making packers' than for the manufacture of general line cans. The progress of invention in the former has, accordingly, been more rapid. Modern machinery for the fashioning of packers' cans doubtless costs far more than that in use 16 or 17 years ago, but even now it can be installed at an expense which is small as compared with the outlay necessary to equip such a plant as is required in many other industries. The small manufacturer has much greater difficulty in so fitting himself for the manufacture of general line cans, as to enable him to compete in all their kinds on approximately equal terms with a powerful rival. He cannot afford to buy all the types of machines which might be more or less advantageously employed in making some sorts of general line cans, because he will have very little use for some of them. He can wisely buy only such as are fitted for the making of the relatively few varieties of cans for which he can build up a considerable demand, or which can be used for some of the simpler operations required for the making of many kinds. Favored by local conditions, such as proximity to markets, etc., he may still make partially by hand, and sometimes may competitively sell, some sorts of general line cans.

CAN MAKING FOR SALE AND CAN MAKING FOR USE.

There have always been, as there are now, can makers who sell all the cans they make, can makers who use all they make, and still others who make a part or all of those they use and who habitually or occasionally sell some of those they make. It was formerly quite common for packers, and even for very small packers, to make the cans they used. Most of the work was done by hand. The machines they had were cheap and simple. Many packers, especially those whose canneries were in rural districts or in small towns or villages,

felt it expedient, if not necessary, to find work throughout the year for some of the hands whose services they needed in the packing season. This practice was going out of fashion before the organization of defendant. To-day it is almost extinct among small packers. On the other hand, tin cans are now used for many purposes for which they were not then employed. There are concerns, each of which use great quantities of them, and of these a number prefer to make those which they need. Moreover, in some regions peculiar conditions make it almost necessary that the user shall be also the maker. For illustration, salmon packing is one of the most important, if not the most important, of all Alaskan industries. The season's supplies needed for [864] the canneries on the banks of these far northern rivers, and for the men who work in them, must be sent up from the States. On the return voyage little is brought back except canned salmon. An empty can takes as much room in the vessel's hold as a full one, while the tin needed to make several thousand cans will occupy no more space than a case of a few dozen filled tins. Therefore those used in Alaska are made at the canneries there. A circumstance which illustrates how comparatively easy, from an economic standpoint, it still is to make cans in small factories remote from industrial centers.

CAN MAKING BEFORE DEFENDANT'S DAY.

In the fall of 1899, or the winter of 1899–1900, there were somewhere from 100 to 175 can makers who sold some or all of the cans they made. Their establishments varied in size and importance from little shops turning out a few hundred dollars worth of cans a year, to well-equipped factories whose sales in the like time ran up to hundreds of thousands of dollars. For the most part, each of them had one plant. There were a few exceptions. The Pacific Sheet Metal Works had factories at Los Angeles, San Francisco, Astoria, and Fair Haven. Norton Bros.' factory was at Maywood, Ill. Corporations controlled by it had plants at Baltimore and on Long Island. There was a Hunt plant at Cleveland, and another at Kansas City. The relations be-

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tween Black and Krebs at Baltimore and the Dugdale Can Company at Indianapolis were close, as were those of the R. Tyne Smith Can Company of Baltimore and the Tri-State Can Company of Keokuk. Doubtless there were other such instances, but there could not have been many. From time to time there were price agreements between a few of the larger makers in particular sections of the country; for example, in Baltimore among the so-called Big Four, and in the Chicago-Indianapolis district. These were, of course, terminable by any of the parties at any time. In the light of our present knowledge, they were doubtless illegal, as they were certainly non-enforceable. There was always the probability that one of the parties to such a gentlemen's agreement might suspect that some one of the others was not acting as a gentleman should, and then, as apparently happened in 1898, open competitive warfare took the place of the more or less uneasy truce which had for a while prevailed. In short, although in certain districts barriers against competition were from time to time erected, some of which proved for a while more or less effective, actual competition in large parts of the country was always operative, and in all sections and at all times there were the potential possibilities of a competition which in a few hours might become real and intense. So far as the record discloses, there never was any restraint upon the perfect freedom of competition in the sale of general line cans.

It is not easy to say what the condition of the can-making industry, as viewed from the standpoint of those engaged in it then, was. The difficulty arises from the fact that most of the witnesses who have testified each tell two mutually contradictory stories. In one breath, they describe the actual conditions of the business under the strain [865] of the competition, subject to which it was then carried on, as very bad. They paint its future prospects as gloomy in the extreme. In the next breath, when asked to explain the reasonableness of the prices at which they sold out to defendant and which might be anywhere from 2 to 25 times the tangible value of all they had in the business, they wax eloquent over the large profits they were making and the hopeful outlook that the future had for them.

The facts probably were that many, if not most, of the can factories, in common with almost all other lines of business, had felt acutely the hard times from 1893 to 1898, augmented as they were by the sharp price war in packers' cans in the last-named year. About that time tin plate fell to what apparently was the lowest point it ever reached. As a result, packers' cans then sold for less than they have ever brought at any other time, before or since. Many of the can makers had shared in the improvement in general business conditions which set in shortly after midsummer of 1898, and in the period which followed some of them doubtless did very well indeed. The men in that business, like all others, had their ups and downs, their trials and their worries, among which not the least was the energetic efforts of their competitors to get their customers away from them.

Comparatively few of them were well equipped with the best machinery then obtainable. Not many of the plants were housed in buildings erected for them. Most of them occupied structures which had been originally put up for other purposes. Relatively little high skilled labor was then, or apparently now is, required in can making. Under such conditions, provisions for the employés' comfort and health were not likely to be what they should have been.

GENERAL CONDITIONS IN 1899–1901.

The period of depression which followed the panic of 1893 was by one cause or another prolonged until the close of the Spanish-American War, five years later. When the tide turned, it did so with a rush. In a few weeks the industrial and financial world passed from the nadir of pessimistic gloom to the zenith of optimistic glamour. Some men made fortunes almost over night, and countless others hoped to. Some of the earlier combinations, or so-called "trusts," whose formation and activities had led to the passage of the act under which this proceeding was instituted, had been very successful. It was quite as true that a number of others had in the panic, or in the subsequent era of depression, gone down to destruction. The misfortunes of those who failed were forgotten, or, when recalled, were

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laid to individual mismanagement. Most people believed that, if a monopoly could be secured in any line of business, the profits which would be earned would be almost unlimited. Some shrewd men knew that, in that state of public opinion, the money which would be made by those who promoted the combination of most of the leading competitors in any line of industry, might be magnificent. Perhaps even they, to a greater or less extent, shared in the general opinion that 2 and 2 so put together would make, not 4, but 22. But whether it was sound or not made little difference to them. They did not expect to get their re[866]ward from the successful operation of the combination. With good management they might realize their profits before it had really started in business.

It was almost universally supposed that there were no legal obstacles in the way of combining any number of individual plants, no matter how large a proportion they might constitute of all theretofore engaged in any one line of business. Men thought that *United States* v. *Knight*, 156 U. S. 1, 15 Sup. Ct. 249, 39 L. Ed. 325, had been decided upon the facts as the world knew them to be, and not as the subsequent decisions of the Supreme Court showed, merely upon that small portion of such facts which the record in that case happened to disclose.

From 1898 to 1902, or thereabouts, the work of forming new combinations went rapidly on. In some industries, as in the manufacture of steel, there was special and real need for bringing under one control the whole series of operations, which began with the mining of the ore and ended with the delivery of the finished product to the ultimate consumer. In still others there were peculiar conditions which seemed to make some consolidation expedient. In many there was something or other which might have been bettered. In all, some of the things which one would rather have had otherwise were brought about by the pressure of the competitive struggle. The panacea popular in financial and business circles, if not among the consumers, was the elimination of competition.

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One of the difficulties in finding out how far any particular combination was really the result of internal economic and industrial forces is that those forces never worked alone. The activity of promoters who might be men already in the trade, but who sometimes never had been, usually bore a large part in bringing about a consolidation. Often it had more to do with the result than all other causes combined, and in some cases it is difficult to resist the conclusion that it was about the only reason why amalgamation was ever attempted. It is quite possible that in an industry like can making, as it was carried on in the closing years of the last century by more than 100 separate concerns, no union, however desirable from the standpoint of either the can makers or the public, could have been brought about except by the efforts of some individuals who thought they could make a quick and large profit for themselves by uniting the various plants under one management, no matter what the immediate or even the ultimate results of such union might prove to be. If that be so, those who think the result desirable will hold that promoters' profits and the extravagant sums required to induce so many independent manufacturers to sell out were a part of the inevitable price of achieving a useful purpose. Unfortunately, under such circumstances the cost of getting rid of competition sometimes proves almost as great as that of letting it alone.

DEFENDANT'S GENESIS.

To pass from the general to the particular: The men who really brought about the organization of the defendant do not appear to have [867] been more than five in number, and only one of them, Edwin Norton, was a can maker. He did practically all the work of persuading, inducing, or coercing the can makers to sell out. He and his brothers had been for a number of years the largest and doubtless the most generally known manufacturers of cans in the country, as he was certainly one of the most active and aggressive. The factories of his firm had probably the best equipment of labor-saving machinery. Certainly in this respect they were surpassed by none. He had been a party

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to the price-maintaining agreements and a prominent figure in the price war already alluded to. The idea of forming a can combine seems to have occurred to him more than once, although the record appears to indicate that the scheme which was actually carried through originated not with him, but with the defendant William H. Moore and his partner and brother, the defendant J. Hobart Moore. With them from the beginning, or at all events from a time preceding the actual formation of the company, were associated the defendant Daniel G. Reid and one William B. Leeds, now dead. Counsel have said that Norton is also dead, although that fact does not appear to be stated in the record. The other three of the original five, namely, the two Moores and Reid, although defendants, all of them directors, and two at least of them active in the management of the defendant, have not testified.

The record shows that in the latter part of 1899 Norton was commissioned by the Moores to get options on can-making plants, and then, or later, on plants for making can-making machinery as well. He set about this mission promptly, and apparently had little difficulty in getting many of the desired options. These, by their terms, were to expire, if not exercised, on May 1, 1900. According to his contemporaneous written statement, the work of obtaining those desired had been practically completed before the 25th of April, 1900. Before that date came around there had been a slump in the stock market, and for a short while financiers laid aside their rose-colored glasses. Though the first options had named Norton as the prospective buyer, the fact that Judge (William Henry) Moore was the leading spirit in the new venture was stated by Norton and was generally known. In April of 1900, Norton wrote to those from whom he had obtained options, telling them, among other things, that the slump in the stock market had made it unwise to go ahead, and requesting an extension of the option to January 1, 1901, so as to give Judge Moore ample time to put the thing through properly, when conditions were right.

For the purpose of discussing the situation, various meetings of the can makers who had given options, or who it was

hoped would give options, were called by Norton, and some of these meetings he attended in person. Among other things, it appears to have been suggested at them that it would be expedient, in view of the prospective consolidation, to maintain prices. The testimony seems to indicate that the price of cans during 1900 was considerably higher than it had been in the immediately preceding years. Subsequently further extensions of the options to April 1, 1901, were asked and secured. They were, [868] as to most of the plants, exercised about the 20th day of March of that year, and, as to nearly all of the rest, within 60 days thereafter.

WHAT PROPORTION OF THE CAN-MAKING PLANTS SOLD OUT.

The parties are not in agreement as to the precise number of plants taken over by the defendant. Controversy is over classification, rather than as to the ultimate facts. The president of the defendant on April 21, 1903, in his report to its stockholders, said that when it was formed, and since, it had taken over 123 plants. Almost all of these were acquired at or within 60 days after defendant's organization. A few of them were establishments not engaged in the making of cans, but in the manufacture of can-making machinery. It is not worth while to try to estimate accurately the number of can-making plants acquired by the defendant at or about the time of its formation. To put them somewhere over 100 will be near enough the truth. The industry of one of the counsel for the defendant has picked out of the record and marshaled in his brief the names of 77 concerns which were in business at the time defendant was formed, and were not acquired by it. A comparison of this list with the record shows that a number of them were engaged in canning or in other lines of industry and sold a part of the cans they made. In many cases, the purchase of the can-making plants apart from the business with which they were connected would have been impossible. Still others were small hand shops, sometimes making other things besides cans. As to many of them, the record gives little or no information except that individuals, firms, or corporations by their names are believed by witnesses to

have been in business in 1901. A very few of them are still making cans. If in 1901 their output had been as large as it now is, some of these surviving would have been considered important.

It is significant that nearly all which now exist began business in 1900 or 1901, after everybody knew that a scheme to combine the existing plants was on foot. Whether the then prospective absorption of the existing factories led to a belief that there would be room for other concerns, or to the hope that a new shop would also be bought, as a number were, it boots not now to inquire. The evidence is convincing that everybody then in a position to know believed that the purpose of defendant's promoters was to absorb practically all the can-making plants of any importance. At the time it was generally supposed that they had succeeded in so doing. The defendant was sometimes referred to as the hundred per cent trust. One of the members of the firm of Norton Bros., a brother of Edwin, testified that he himself never thought it had 100 per cent of the country's can-making plants, but he did believe it had from 95 to 98 per cent of the total capacity, excluding those concerns which made cans for their own use. It is very possible that even this estimate is somewhat too high. Nevertheless, many exceptionally well-informed witnesses found great difficulty in recalling, in their section of the country, the name of a single can plant which was not taken over by defendant. No such approach to precise accuracy as is possible in the great steel industry, which can be carried on only in plants of considerable magnitude is possible [869] here, but there is every reason to believe that the defendant acquired the business and plants of concerns which on the 1st of January, 1900, made 90 per cent of the cans used in this country and not made by establishments which themselves used the whole or a part of their output.

WHY DID SO MANY CAN MAKERS SELL OUT?

How were so large a proportion of the can makers induced to sell? Fear of what would happen to them, if they did not, unquestionably had more or less influence with a good many of them. There is some testimony that Norton told

some of them that if they did not sell out they would be put out.

The record does not affirmatively show that such threats were frequently made. They were not required. Apart from anything he said, apprehension was quite general that the only choice was between going out or being driven out. The country was at that time familiar with stories of the fate of those who in other lines of business had refused liberal offers from combinations previously formed. The records of the so-called Anti-Trust cases have since shown that some of these tales were not without foundation in fact. What was most feared was that a can maker who did not go into the combine would have difficulty in getting tin plate, the raw material of his business. The concern to which the defendant the American Steel & Tin Plate Company succeeded, and which, together with that successor, will be called the "Tin Plate Company," had been then recently organized. Prominent among those who officiated at its birth were the Moore Bros., Reid, and Leeds. Norton and others spoke as if the relations between the proposed can company and the new Tin Plate Company would be very close. Throughout the can trade it was currently believed that they would be. In point of fact, it is probable that they did not become as close as Norton then wished everybody to think, or as close as he then, himself, expected. There is testimony that he afterwards said that for this purpose the defendant had been born a year too late. An intimate connection between the Tin Plate Company and the defendant was a danger to all other can makers. If it should suit the defendant to wage a price war, its competitors would be hopelessly handicapped if it were able to buy its raw material appreciably cheaper than they. Nor were price discriminations all that they feared. Failure to make deliveries when and as required might be even more destructive to their business. Before the defendant was formed, it became known that it had acquired many options on patents for can-making machinery, and apprehension that it would be difficult for outsiders to secure an up-to-date line of machinery was rife, and, as the sequel shows, was amply justified.

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Moreover, at that time few people knew anything of the ability of a small producer to maintain himself in competition with a rival having resources exceeding his 10, 20, or 100 fold. Possibly, the last word on that subject has not yet been spoken, but the experience of the last 15 years has apparently shown that in many lines of business the small [870] man can, under such conditions, live and even thrive. Then, many feared that it was not possible.

It is to be borne in mind that, for reasons already stated, few of the can makers were, or could have supposed themselves to have been, even moderately equipped to carry on a competitive struggle with a rival possessed of many times their capital. Some of them who were financially stronger than most of the others were elderly men, or were in poor health, or for other reasons were loath to venture upon so perilous a warfare.

It is not suggested that there was any general, intense, and settled objection to selling out to the defendant or its promoters. If there had been, doubtless so many would have postponed giving options that the idea that everybody was going in could not have so rapidly spread. If it had not, a good many of those who did sell out might never have done so. All that is meant is that, except for the fears already stated, a number who gave options would not have done so, and some of those who really were willing enough to give them would have taken a chance on standing out for even a larger price than they received.

PRICES PAID FOR PLANTS.

As a rule, the prices paid were liberal, not only to the verge of extravagance, but in cases almost beyond the limits of prodigality. If Norton sometimes showed the can makers that there was steel in his scabbard, his hands always dropped gold. The record does not disclose a single case in which the price named in the option did not exceed the value of all the tangible property transferred. The amounts paid appear to have ranged all the way from 1½ to 25 times the sum which would have sufficed to have replaced the

property sold with brand new articles of the same kind. Before agreeing on the figures to be inserted in an option, Norton does not appear to have taken the trouble either to make or to cause to be made any inspection or appraisement of the plant to be transferred. Under such circumstances, the ratio between the real value and the price named depended more upon the nerve or the impudence of the seller, than upon any estimate of his property's probable worth to the new combination.

The defendant has no record of what was paid for the different plants so acquired. Wherever the seller was still alive, could be located, and was in physical and mental condition to testify, the Government has proved by him what he received for his property, and so far as he could, or would, tell what it had cost him. In some cases the former information, in many the latter, could not be obtained.

From a careful study of what the record discloses, I have reached the conclusion that the amount which the promoters agreed to pay for the plants taken over through them was probably somewhere around $25,000,000, of which not more than $23,500,000 was given for the 95 plants turned over to the defendant on the day after it was organized. It is certain that for half, and not improbable that for a third or less, of that money, defendant could have purchased land, erected buildings, and equipped them with machinery which [871] would have had a greater capacity, could have been operated at a smaller cost, and would have been at least as well, if not better, located with reference to the needs of the consumer and the facilities for transportation.

It is true that not all of the sellers received their whole price in cash. A month or more before the formation of defendant, Moore Bros., calling themselves managers, circulated a subscription agreement. This paper set forth that it was proposed to organize the defendant; that its stock was to be one-half common and one-half preferred, the latter entitled to a cumulative dividend of 7 per cent per annum; that by the issue of $39,000,000 of preferred stock and the like

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amount of common, the defendant was to get $7,000,000 cash for general corporate purposes, and the real property, plants, buildings, fixtures, machinery, tools, patents, trade-marks, and good wills of 95 named concerns. For every $100 of purchase money, a subscriber was to receive a share of preferred and a share of common stock, each of the par value of $100. Some of the sellers of plants took all of the consideration in stock on that basis. Most of them took some of it. Within limits, efforts were made to induce them so to do. They were assured, and doubtless with entire truth, that the new company could not be formed at all unless the larger part of its stock was subscribed for by those whose plants it was to absorb. Yet no one of the sellers was actually forced to take stock. Some of those who received among the highest prices, both absolutely and relatively, did not take a share, as, for example, one concern which was paid $500,000 for a plant which had cost it from $60,000 to $70,000. From one incident, to be hereafter referred to in another connection, it must be inferred that the stock as late as the 10th of the succeeding October could still be sold at the subscription price, although the same incident strongly suggests that, if at that time any large quantity had been offered for sale, a bad break in the market would have followed.

RESTRICTIVE COVENANTS.

With very few exceptions, all the options contained a clause which bound the sellers, in the event that it was accepted, not to engage for 15 years in can making within 3,000 miles of Chicago. Where the seller was a corporation, its principal officers personally bound themselves by like covenants. In some few instances, can makers declined so to restrict their freedom, and still their plants were bought. Nevertheless, the promoters obviously attached considerable importance to securing such covenants. It is in evidence that the owners of one plant struck it out from the first option they signed. Afterwards, they were induced to give another with it in, but in return were allowed to raise their price from $300,000 to $700,000.

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PURCHASE OF STOCKS OF MERCHANDISE, ETC.

As weeks and months might elapse between the giving of an option and its acceptance, some provision had to be made by which in the interval the prospective sellers could carry on business with fairness to themselves and to the would-be buyer. The price named in the option was intended to cover only what may be summarized as the [872] plant, patents, and good will of the business, including its real estate or leasehold interests. It was agreed that at the time the sale was consummated all fuel, raw material, and partially or wholly finished products should be bought at the then market price. The purchaser bound itself to assume all leases and bona fide contracts for the purchase or sale of material, raw or manufactured.

ORGANIZATION OF DEFENDANT.

All the preparations deemed necessary having been made, the defendant was on the 19th of March, 1901, incorporated under the laws of New Jersey. As was then, if not now, the fashion, the incorporators and first directors were all employés of a New Jersey Trust Company or of law firms concerned in the organization. The capital of defendant was fixed at $88,000,000, one-half common, one-half preferred.

On the day after the incorporation, these directors received from one McCaughy, to whom all the later options had been given or assigned, a proposition to sell to the defendant the 95 plants which had been named in the subscription agreement, and to pay it $6,995,000 in cash. The $5,000 more needed to make up and the $7,000,000, promised in the agreement in question, had already come into the defendant's treasury in the form of payments for the qualifying shares of preferred stock issued to the first directors. His price was $38,995,000 in par value of preferred and $39,000,000 in par value of common stock. The company was, of course, to assume all his obligations to buy the merchandise of the plants taken over. Then the minutes carefully state that "statements and estimates by Mr. Edwin

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Norton, familiar with said properties and the business thereof, were made to the board relative to the value and earning capacities of the properties and business aforesaid," and the directors thereupon resolved that their acquisition was necessary. McCaughy's proposition was accepted. He was a clerk in Moore Bros.' employ.

It will be borne in mind that not one of the five directors who, on behalf of the defendant, bought, nor McCaughy, who sold, had a dollar's worth of interest in the transaction, or, so far as it appears, ever expected to have. It is to be regretted that in organizing large corporations there ever was a real or supposed reason for all this elaborate make-believe, for the putting of dummies in the foreground while the real principals kept themselves in the rear. It is true it was the fashion. Everybody who took any part in the transactions, or who at the time had any real interest in them, knew, or upon the slightest inquiry could have found out, that none of the men who figured on the corporate minutes as buyers or sellers were in fact such; that the directors, in spite of going through the form of listening to Norton's estimates, etc., had never exercised any judgment of their own, and had never been expected to. Nevertheless, if there is no purpose in going through such play acting, it had better be omitted. If it accomplishes anything, it must be in the way of making it easier for those who really will what is done to escape responsibility for it, if they should ever want to. Whenever in the course of an investigation of the corporate history the facts come out, they tend to make [873] very many people who are neither lawyers nor wise in the ways of large corporations feel that juggling and deception are a part of corporate life. Danger to the community lies that way. So much by the side.

THE PROMOTERS' SHARE.

As has already been stated, the prices named in the options for the 95 plants, extravagant as in most cases they were, could not apparently have exceeded $23,500,000. The promoters were to furnish $7,000,000 cash, or, in all, in stock and money they were to lay out $30,500,000, for which

they received $39,000,000 preferred and $39,000,000 of common stock. At the price of $100 for a share of common and share of preferred, their return was to be the difference between $39,000,000 and $30,500,000, or $8,500,000, a sum which, in cash, wisely expended would itself have sufficed to have given the defendant far better can-making facilities than it secured.

Defendant and its counsel insist that it and what it has done have been of great benefit to all connected with the can-making industry. It is fair to presume that its promoters must have thought so too, otherwise they would scarcely have been justified in rewarding themselves upon so liberal a scale for having brought it into being. They, of course, assumed some heavy responsibilities. How serious these were it is not possible now to estimate. Much of the stock had been taken by the sellers of individual plants; much of it had not been. Doubtless a good deal of it was absorbed by the public. In the end, the defendant itself relieved the promoters from the burden of some of it. Something more than six months after the defendant was organized, or, to be precise, on the 10th of October, 1901, there was a meeting of its executive committee. On behalf of McCaughy, it was stated that in securing the plants he had found it necessary to obtain advances on the stock of the defendant and that he was forced to sell some of it; that he had received an offer of $1,052,300 for such stock at the original price of $100 for a share of common and a share of preferred, but, before he sold elswhere, he wished to make the same offer to the defendant. It will be remembered that McCaughy had no interest in the transaction and did not own any of its stock and was a mere employé of the Moores. Of the six members of the executive committee present when his proposition to be relieved of the stock was accepted, four were among the five original promoters, namely, W. H. Moore, Reid, Leeds, and Norton. The record does not disclose how the defendant ultimately came out on this transaction. It is certain that shortly after that time its stock declined below the figure named and for a number of years remained below.

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The chief purpose, however, for referring to this incident, is because of the light it throws on another phase of the defendant's history. It will be remembered that it was supposed to start its business life with a cash working capital of $7,000,000. This purchase of its own stock reduced that sum, at least temporarily, to $5,947,700. It had agreed to purchase, and in fact had purchased, the stocks of merchandise, etc., of the plants taken over at and within the first three [874] months of its organization. One of its books in evidence seems to show that the money expended for this purpose was about $6,250,000. In other words, it really began life without a free dollar to its name, an experience which was by no means unusual in the flotations of that period.

CONTROL OF CAN-MAKING MACHINERY.

Much can-making machinery, more or less in use as late as 1900 had never been patented, or, if it had been, the patents on it had expired. A great many of these machines were of such simple construction that they could be made in almost any fairly equipped machine shop. To secure control of all such would have been impossible. Some of the most modern machines, those by which a large part of the work formerly done by hand was performed automatically, were, however, covered by patents. If these patents could be secured and arrangements made with the few machine shops in the country which were then equipped for turning out machinery of that class, competition in can making and can selling would be greatly hampered. Indeed, if the possibility of competitors obtaining such machinery could be cut off for a comparatively limited period, possibly even for a year or two, the can company which acquired a number of plants equipped with such machinery and which could obtain more of it from the manufacturers could, if its operations otherwise were wisely carried on, secure a domination of the market, which could not be seriously shaken for years to come. The record shows that the defendant did acquire such control, although, for reasons to be subsequently pointed out, it did not reap all of the results which it naturally expected therefrom. It sought

for six years to close to its competitors the machine shops which really counted. The largest manufacturer of automatic machinery for can-making purposes was the E. W. Bliss Company. For the sum of $25,000 a quarter, that company agreed that for six years it would not make certain can-making machinery for anybody other than the defendant. The latter had made some claim that patents owned by it covered such machines. The Bliss Company did not think they did. In any event, it is unusual for the owner of patents to pay somebody else $100,000 a year not to infringe. From the Adriance Machine Company defendant agreed it would annually for six years take $75,000 worth of machinery. That amount represented the full capacity of the machine company. To the Ferracute Machine Company, in return for exclusive privileges, the defendant guaranteed a profit of $10,000 a year for six years. Defendant induced the Bliss Company to break contracts which the latter had already made to furnish such machinery, and, when the injured parties sued the Bliss Company for damages thus resulting, the defendant paid both the expense of defending the suits and the substantial judgments some of the aggrieved parties recovered.

An interminable mass of evidence has been taken to show what machines for can making were in use at different periods, which of them at particular times were covered by patents, and which were not, and the various shops in the country at which such machines could [875] be made. It is impossible to review this testimony in detail. The record amply justifies the assertion that for a year or two after defendant's formation it was practically impossible for any competitor to obtain the most modern, up-to-date, automatic machinery, and that the difficulties in the way of getting such machinery were not altogether removed until the expiration of the six years for which the defendant had bound up the leading manufacturers of such machinery. The contracts between the defendant and some of these machine shops were sometimes evaded. The machine makers had reserved the right to sell machinery for export to countries other than the United States and Canada. Some of that

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machinery was exported and brought back to the United States. Some of it never got further than the dock in New York or Jersey City, and thence found its way to a can-making factory somewhere in the United States. The demand for can-making machinery which sprang up at the time the defendant was organized, and largely in consequence of the policy which it then pursued, stimulated the supply, and other inventors and other machine shops, before very long, began to turn out some very good can-making machinery.

TIN PLATE AT PREFERENTIAL PRICES.

The record does not disclose whether the promoters of the defendant really had reason to believe that they would be able practically to shut off the supply of tin plate from their competitors, as Norton in 1900 and early in 1901 was at least willing that the trade should think. As already stated, none of the promoters have seen fit to tell their story under oath. As it turned out, all the Tin Plate Company was willing to do was to bind itself to sell its tin plate to defendant at a certain fixed figure, below the price at which it sold to any one else. This preferential discount or rebate amounted, when the published list price of tin plate was $3.50 a base box, to about 64 cents on the quantity of plate required to make 1,000 3-pound packers' cans. This difference, the record shows, was far from negligible. In a close competitive struggle it might well have proved a decisive factor.

DISMANTLING PLANTS.

The defendant began to shut up plants so soon as it got possession of them. It kept on shutting them up until by April 21, 1903, it was operating only 36 can factories, and 3 machine shops, and it then proposed to close 5 more of the former and 1 or 2 of the latter. There has been a good deal of profitless dispute as to the proper term to describe what was done. What the Government terms "dismantling" the defendant prefers to speak of as "transferring" or "concentrating." What actually took place is clear enough, whatever one may choose to call it. Two-thirds of the plants

bought were abandoned within two years of their purchase. Many of them were never operated by the defendant at all, and others were closed after a few weeks or a few months. Where they had any machinery for which use could be found at some other of defendant's plants, such machinery was transferred to the place where it could be used, which might be a few blocks away in the same city or hundreds of miles off in another [876] State. Where it was possible that a piece of machinery might some day be of some use, although there was no immediate call for it, it was sent to some abandoned factory building to be there stored until it was wanted, or until it became clear that it never would be. Such machines, and there appear to have been many of them, as were too obsolete for economical use, were broken up and their fragments sold as junk. Defendant has offered much testimony which shows that what it did, did not reduce the aggregate productive capacity of its plants below that of those purchased by it. Nevertheless, it is quite probable that, during the process of closing old factories with a view of concentrating production, there may have been a period in which the defendant was not able to turn out as many cans as it could have made had it simply continued to operate all the shops it had purchased to their full capacity. If so, the time during which this was true probably did not exceed a few months, or a year or two at the most; but, in any event, the reduction in productive capacity was a mere temporary incident, even if it be regarded as an inevitable one of the policy of concentration, and was not in itself the end sought or desired. Defendant shut down most of the plants it bought because that was by long odds the best thing to do with them. Cans could be made cheaper elsewhere.

PURPOSE FOR WHICH DEFENDANT WAS FORMED.

Defendant denies that in its formation or early conduct there was any purpose to restrain competition or to secure a monopoly. It alleges that its organizers always had in mind the obtaining of some of the beneficent results which the record shows have in fact been realized. Its promoters have not seen fit, under the sanction and test of cross-exami-

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nation, to tell us so themselves. Apart, however, from any presumption which may be drawn from their failure to take the witness stand, the facts dispose of this contention. The contemporaneous declarations of Norton show the purpose was to get into the combine all the important can makers and, so far as was practicable, the important makers of can-making machinery, as well. The carrying through of the plan was always understood to be dependent upon the securing of the greater number of the plants then engaged in business, a matter really of no importance, if the purpose in view had been nothing more than to engage in can making on a large scale and with up-to-date facilities.

No can factory at that time needed any other plant purchased to make it a complete economic unit. In this respect conditions differed from those which at that time existed in the steel industry.

The business of lithographing on tin for the purpose of turning out decorated cans was then coming into vogue. There were can factories which had a decorating department. Most of them did not have. There were a few shops which decorated, but did not make cans. It does not appear that the work of turning out completed cans was in any other respect divided between or among two or more factories. All the shops, however small, did all the work of converting tin plate into the finished can. If there had been any urgent reason for uniting [877] more closely tin lithographing and can making, there was no difficulty in doing so. Neither required any very large initial investment in machinery or tools.

There was no other conceivable reason, than the desire to suppress competition, for buying plants which it obviously would not pay to run, and at prices which in most cases far exceeded the cost of fitting up, with brand new and up-to-date machinery, factories capable of turning out several if not many times as many cans in the same time. It is in this connection that the prompt and wholesale dismantling is significant. What was done in that respect shows that the plants were bought, not for use, but to get them out of the market. If it be urged that they had an established

business and good will which it was worth defendant's while to pay for, the answer is twofold: First, that according to other claims of defendant, the methods followed by those concerns in their dealings with their customers were such that their good will was valueless, or certainly would become so when they were brought into competition with the manner of doing business defendant now says it was even then its purpose to adopt; and, second, that defendant paid quite as extravagant prices for plants which had neither good will nor established trade, for the simple reason they had not yet begun business at all. As, for example, one factory, which had not made a can and which had cost $16,000, was bought for $80,000, and another in this city, the machinery of which then recently purchased had cost $12,200, was sold to the defendant for $40,000. Very similar was the case of a man whose father had given an option on his established plant. The son thereupon put $10,000 in machinery and sold it to defendant for $20,000 of its stock and $40,000 in cash. He apparently thinks he did not get quite as much as he should.

There can be no possible explanation of such transactions, except that the defendant and its promoters wanted to extinguish competition and did not stop to inquire how much it would cost to do so. There could not have been any reason for paying a bonus of $100,000 a year to the Bliss Company, and less amounts to Adriance and Ferracute, except to make the re-establishment of competition more difficult. Securing, where possible, the covenants which bound the sellers not to engage in like business for 15 years within 3,000 miles of Chicago, had the same end. One who sells his business with its good will may, in order that what he offers may command its maximum value, lawfully bargain that he will not impair its worth by engaging again in that business anywhere in the region in which he had formerly carried it on. Such a limited restraint is lawful because it is reasonable and does not go beyond the occasion for it, but there is no legitimate reason why one who has carried on a business in one city and in the region within 100 or 200 miles of it should be asked to bind himself not to engage in

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the same kind of business in some place thousands of miles away. Some cases have held that, under peculiar conditions, a nation-wide restraint may be lawful. Assuming without deciding that that is true, it can only be when the business sold had itself extended from ocean to ocean. Not a single concern, which at or about the time of defendant's organization was bought by it, [878] had ever sold cans in any portion of the greater part of the territory in which it and its officers were required for 15 years to abstain from going into business. Many of them, probably, had never shipped a can more than a couple of hundred of miles from their factories. The record shows that even now freight rates, the imperative necessity on the part of the purchaser that he shall be sure of reasonably prompt deliveries, and other causes, impose very marked geographic limitations upon the area in which a single factory can sell its output in substantial quantities. Defendant now seems to argue that no significance should be given to these restrictive covenants. The reason by which this argument is sought to be sustained is rather out of the ordinary. It is said that no attention should be paid to these covenants because they were clearly illegal and every one knew they were. One reply is that people who were acting under the advice of about as able lawyers as were to be found anywhere do not deliberately and repeatedly do clearly illegal things without having a purpose in so doing, and especially do they not pay $400,000 to a single firm in order to have that illegal thing done by its members.

It is true that defendant has taken no legal proceedings to enforce these agreements, although the industry of one of its counsel has brought together in its brief 34 cases in which, according to him, the record shows that persons who have entered into the covenant broke it. Nevertheless, it was by no means always the idle thing the defendant now says it was. Defendant's representatives did not always speak in that tone. They more than once reminded persons who had signed it of its existence. It meant something even to defendant's counsel when they were cross-examining witnesses in this case. They frequently and quite naturally

showed that they thought rather ill of one who had made such an agreement and had not kept it. In point of fact, some of its signers, perhaps many of them, believed it to be binding. Still others, and they were unquestionably numerous, having signed it and taken money or money's worth for signing it, felt in honor bound to keep it. Such men cared nothing for what a court might say as to its legal enforceability. Their consciences enforced it as against themselves. The only possible reason for exacting its signature must have been to make probable that nowhere in the country would their skill be available for can making.

PRICES RAISED.

With practically all the can plants in the country in its hands, with the control of the really effective can-making machinery secure for some time to come, it seemed that it would be a long while before there could be any chance for competition worth bothering about. Many people thought so. As already stated, many of the most experienced men in the business had been largely influenced in their selling out by the fear that successful competition with defendant could not be carried on. This forecast did not take sufficiently into account the extent to which, from the start, the defendant found itself handicapped, by the way in which it had been formed. The absurd prices paid for can plants which it did not want and could not [879] use, and the immense sum absorbed by its promoters, had resulted in a tremendous over-capitalization. As already pointed out, it started with scarcely any free working capital. It could not wait for its profits. They must be made at once and in large volume, otherwise it would be upon the rocks before it was well started on its voyage. Prices had to be raised. This raising had the added advantage of furthering the general acceptance of the idea that the defendant was going to be a tremendous money maker. In that way the process of absorption of the large mass of its undigested securities with which the promoters were doubtless still struggling would be greatly aided. Prices were put up. There is much dispute as to how great the rise

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was. That, of course, depends largely on what basis is taken for the comparison. As compared with the prices prevailing three years before, it was very great. It was appreciable, but not so striking, when contrasted with those quoted after the formation of the defendant had become probable or certain. Comparisons of one year with another during that period are difficult because of the violent fluctuations which then took place in the price of tin plate. Tin plate from 1896 to 1898 was low, being lower in the last-named year than any year before or since, while from 1899 to 1902 it was higher than at any other year from the time when the making of it had become actually established in this country, down to the filing of the petition in this case. It was very decidedly higher in 1900 than it was in 1901.

Defendant argues that whatever rise in prices it made was slight. The uncertain recollections of witnesses as to what took place at a particular period 13 or 14 years before they testified are not usually of great value. More importance may justly be given to the recorded facts of actual transactions then made; but, for the understanding of the real significance of some of them, more knowledge as to all the surrounding circumstances is required than can be now easily obtained. It is not worth while to go into such inquiries.

COMPETITION REVIVES.

What happened shows that prices were put up to a point which made it apparently profitable for outsiders to start making cans with any antiquated or crude machinery they could find in old lumber rooms or which they could have made for them in a hurry, or even to resume can making by hand. The evidence on these points is absolutely conclusive. Can making became attractive. Any number of people began to make cans, or, at least, began to try to make them. Perhaps in some cases the prices which had been paid for can shops made them hope that if they could get a can shop they would be able to sell out at a figure which would make them comfortable for the rest of their days. At first, the defendant seems to have thought it would try to buy them out, and it bought a few of them, as already has been men-

tioned; but in a few weeks, if not in a few days, it became plain that such policy was impossible. In the first place, its money was gone. It still had between $2,000,000 and $3,000,000 of stock which might be sold, but there was already doubtless so much of that stock seeking a purchaser that it was becoming more and more difficult [880] to keep quotations up to the issue price. There were too many new shops to buy them all, and, as it has turned out, it was easy enough to start some more. The real remedy would have been to reduce the price of cans. If defendant had not been under the necessity of realizing large and quick profits doubtless it would have done so. Its mere cost of operation, excluding any allowance for capital investment, must have been below that of many of its poorly equipped competitors who then rushed into the field. But, if prices had been reduced, the idea that there was a speedy fortune to be made by defendant's stockholders would have been too speedily dispelled. Other devices were resorted to. The attempt to keep up the price of cans was persisted in. In an effort to do so, the defendant itself sent brokers into the market and bought some millions of cans from its rivals. Some of these were very badly made, as was to be expected from new shops, equipped with wretched machinery and hastily rushed into business. These cans were stored for a while, and ultimately such of them as were salable at all were sold for what they would bring. Possibly these purchases did keep up the price longer than would otherwise have been the case.

RAISING PRICES DURING THE CANNING SEASON.

Following the practice which had been common before its day, and to put an end to which it now says was one of the principal objects of its formation, defendant raised its prices as the canning season of 1901 advanced, until they reached the maximum in August, September, and October of that year. Taking the price of tin plate into account, they were then roughly about 60 per cent greater than the prices which from 1910 to 1913 prevailed, and for which cans had been purchased in a number of the years preceding

defendant's formation. The defendant seems to have realized its mistake, and the 1902 prices were materially lower. In 1903, prices were again rather sharply raised, but by the close of the packing season of 1904 they had been brought down to a trifle above that which has been their subsequent average. By that time the opportunity absolutely to monopolize the market had been lost. It is true that many, apparently the great majority, of the people who in 1901 rushed into can making were forced out of business, so soon as prices came down from the abnormal heights to which they had been lifted. The record contains quite a suggestive list of such concerns whose history was like that of the seed sown on stony ground; but there were others who went into the business with more resources, both in money and brains, and, consequently, with greater staying powers. The demand for can-making machinery had stimulated the supply, and, while the so-called "independents" were not until 1907 able to get the best automatic machinery, they could after 1902 obtain far better machines than were accessible to them in 1901. Moreover, tin-plate mills, other than those controlled by the Tin Plate Company, were being established. Those who were minded to stay in the can-making business as competitors with the defendant were free by this time from the apprehension that it could cut off their supplies of either tin plate or machinery. It [881] doubtless could get the former cheaper and the latter better than they could, but it was greatly over-capitalized, and they might stay in the struggle with some reasonable chance of surviving.

THE LEGAL SITUATION IN DEFENDANT'S EARLY YEARS.

Such is the history, as the record discloses it, of the genesis of the defendant, such the story of its organization and of its conduct during the first years of its existence. It is clear an attempt was made both to restrain and monopolize the interstate trade in tin cans. Trade was restrained. For a moment a substantial monopoly was obtained, and in many sections of the country, long maintained. So far as one can judge, it might have been held almost or

quite everywhere had not the very determination to make it ostensibly perfect at the start, combined with the reward which the promoters felt they were entitled to take at the beginning, compelled it to attempt a premature harvesting of the monopolistic fruit. Upon such state of facts, had the Government then asked for a dissolution of the defendant, it is difficult to see how the demand could have been refused. No matter what view might have been taken on any of the questions now still open to dispute as to the construction or application of the Anti-Trust Act, there was a restraint of competition and an attempt to monopolize, which, so far from being merely incidental to any legitimate purpose, had themselves put obstacles, and unnecessary obstacles at that, in the way of attaining the benefits which larger capital, better organization, and more efficient business methods might have naturally brought about.

THE RECENT CONDUCT OF DEFENDANT.

Beside charging the defendant with in effect fixing the price of cans throughout the country, the Government specifies certain unfair practices of which it says the defendant has been guilty, and alleges that there are still others of which the Government has no certain knowledge, but which would be developed in the course of taking the testimony.

Before considering the question of how far the defendant does determine the prices at which cans are sold, it will be more convenient to inquire to what extent, if at all, the evidence sustains these other charges of the Government. At the outset, it may be said that the testimony has disclosed nothing in the recent conduct of defendant, other than that which the Government particularizes, to which any serious exception, or indeed any exception at all, can be taken.

CHARGE THAT THE CAN COMPANY COMPELS CONSUMERS TO TAKE ALL THEIR CANS FROM IT UNDER PENALTY OF GETTING NONE.

The Government's petition charges that the defendant induces or compels its customers to enter into long-time contracts to purchase cans exclusively from it, and prevents them from dealing with such independent establishments as

exist, by threats, among others, that it will cancel contracts it already has with them, and will refuse to sell more cans to them. It is true that defendant sells a large portion of its cans under contracts by which, for a definite time, it agrees to [882] furnish, and the customer to buy, all of the cans he will need in his business. Many of these contracts are for two or three years, some for as long as five.

CONTRACTS FOR SEASON'S REQUIREMENTS.

Prior to the formation of the defendant, packers' as well as general line cans were almost exclusively sold under contracts which required the seller to furnish, and the buyer to take, a certain definite number of cans within a certain limited time, at a fixed price. There might be some leeway as to quantities. It is possible that sometimes the contracts, either by their terms or by the way in which the parties acted under them, really amounted to a bargain to supply at a fixed price a packer's requirements for the season. Such cases were, however, rare. The rule was otherwise, and under it the packer was often put to great inconvenience, and not infrequently suffered serious loss. Sometimes strikes among the can-maker's employés, a breakdown in his machinery, or his inability to get tin plate, prevented prompt delivery. More often it turned out the buyer had not bargained for all the cans he needed. Until the season was well advanced it was not possible to know how many he would require. He was usually under contract to take all the tomatoes or other fruits or vegetables raised by certain farmers and growers. Too much or too little rain, destructive hailstorms, early frosts, might cut down the crop. None of these troubles might be experienced, and the output might be large. The canner could seldom afford to carry over any great number of cans from one year to another. He was therefore afraid to bargain for more than he felt reasonably sure he could use. When they did not suffice, he was forced to buy at the prices then prevailing. Usually the same crop conditions which sent him into the market simultaneously drove others there. The can makers, as a rule, sold the cans for which contracts were early made at very low prices. They looked

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for their profits to the late season demand. Then the canner had to have cans, and frequently had to take the first he could get, no matter what was asked for them. The difference in price between cans bought early and those bought late was often great.

Not long after the defendant was formed, it made some contracts by which it undertook to supply a packer with all the cans he would require for a season at a price which was to remain fixed through the year, no matter how many he took. Many of these contracts contained provisions by which the cans taken early in the year would be furnished at a somewhat lower price than those which were not ordered until late in the season; but the prices, whether they varied with reference to the time of delivery or not, were fixed in advance. So far as one may judge from the record, the inauguration of this practice was more accidental than intentional. As already stated, during the first year of defendant's existence, it followed the old custom of the trade of raising its prices as the season progressed. During March and early April, it sold three-pound cans at $24 a thousand. On April 25th it advanced them to $24.50; on May 1st, to $25. Another dollar was added on the 1st of June, and still another on the [883] 1st of July, the price then being $27. On August 1st, when the tomatoes were beginning to ripen, $3 a thousand more was put on, so that $30 was asked. That figure continued until November 1st, when, Jack Frost having presumably put an end to most of the demand for packers' cans for that season, a drop of $7.50 a thousand was made; $2.50 more was taken off on December 1st, so that the price when packing was going on was 50 per cent greater than it was after the season had closed.

No clear statement of the circumstances under which originated the practice of contracting to furnish a packer with all the cans he would need for the season, at a price determined in advance, is found in the record, but its advantages from the standpoint of the consumer were so great that it speedily went into almost universal use, and, after defendant's first year, there does not seem to have been anything more than a very moderate difference between its mid-winter

and its mid-summer prices. Under the old method of selling, in years of bounteous crops, the canner would be required to pay for the extra cans he needed a price very much in excess of that ordinarily prevailing, while in years of scarcity of canable fruits and vegetables he would have cans on his hands which could be sold only at a material loss. Many consumers have testified. They are practically unanimous in their approval of the new method. They know in advance what the cans will cost them, and make their own contracts and arrangements accordingly. Only a large company can carry on business and sell cans in that way. Probably it can only safely do so when it has a number of factories located in different parts of the country. A shop, the possible production of which could not exceed a certain figure, could not well afford to do all its business under such contracts, because, if it did, it would either have to limit its engagements, so that in years of ordinary consumption it would sell only a percentage of its possible output, or else would expose itself to the possibility of heavy damages in years when there was a large demand because it had contracted to furnish more cans than it could make. The larger the plant and resources of any particular can maker, the less dangerous such contracts would be to it. Even so, there would be risks, and serious ones at that, unless he had factories in different canning sections in which it was not likely the crop conditions would be precisely the same.

CONTRACTS FOR MORE THAN ONE YEAR.

From the record it appears doubtful whether the practice of making contracts for more than one year originated with the defendant or with some of its competitors. In such agreements the seller finds it necessary to protect itself, and also its customers, by providing that the price shall rise or fall with the rise or fall of the price of tin plate. An inducement usually given by the defendant, and such of its competitors as make these long-time contracts, is the reduction in price of 25 cents a thousand from the regular list price of cans. This discount, which never amounts to more than 2½ per cent of the price, is relatively as well as

absolutely small. If a man wants to make a contract for a long term, he will probably prefer to make it with a [884] strong concern rather than with one which is financially not so robust. It is therefore possible, or indeed probable, that the coming into fashion of these long-term contracts has in that way been of more advantage to the defendant than to its competitors; but, if so, the result appears to have been accidental rather than premeditated.

The charge of the Government that the defendant refuses to sell persons who will not make long-term contracts with it, or refuses to sell those who buy any of their cans from its competitors, is disproved. Probably a hundred or more witnesses from different parts of the country testified that though they were under contract to take their cans from competitors of the defendant, and had in fact been taking their cans from such competitors for years, the defendant was always ready and willing to sell them cans when any accident or mistake, either at the plant of the competitor, or on the part of the transportation lines, left the consumer unsupplied. Such cans were sold them at the regular list prices; that is, at the prices the defendant charged those who bought exclusively from it. Indeed, it would appear that some of the defendant's competitors conduct their business upon the assumption that defendant will do this very thing. They feel they can safely agree to furnish many customers with all the cans they will need in a season, because, if they are asked for more than they can make, they know at what price the extra amount needed can be obtained from the defendant. In that way they are able in advance to calculate accurately the maximum risk they will run.

EFFECT UPON THE TRADE OF THE PREFERENTIAL PRICES AT WHICH DEFENDANT OBTAINED TIN PLATE.

The Government alleges that the same persons, in the main, who organized and always dominated the defendant, organized the American Tin Plate Company, since absorbed by the defendant, the American Sheet & Tin Plate Company. It says some of them are now directors of the United

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States Steel Corporation, which owns substantially all the stock of the American Sheet & Tin Plate Company. These allegations may, for the purpose of this case, be taken as established. It also may be admitted that at the time the Government's petition was filed the defendant, the Tin Plate Company, produced, if not 60 per cent of the tin plate consumed in the country, as the Government alleged, at least 50 per cent, as it itself admits, and that it is by far the largest single producer of tin plate.

Down to some months before the institution of these proceedings, the Tin Plate Company was under covenant to give the defendant its tin plate at a fixed number of cents a base box less than it furnished such plate to any one else. Since April, 1913, it sells the defendant below its published list prices, but it no longer binds itself to require all others to pay those prices. Whether it has exercised the liberty thus reserved, the record does not show. The preferential rebates received by the defendant from the Tin Plate Company in the period from 1902 to 1913 amounted to the large sum of $9,000,000. The answers of both the defendant and the Tin Plate Company claim that these transactions were normal and the allowances were those [885] which would naturally be made to an exceedingly large consumer. The facts seem to show that the parties themselves did not so regard them. Tin plate was billed to the defendant at the fixed list price, and the rebate was subsequently paid. Great precautions were taken by the defendant to conceal the facts from most of its book-keepers, and even from some of its officers. The rebates, when obtained, were entered upon the books of the defendant in such a way as to conceal their origin. During the early years of defendant's career, its competitors in most, if not all, instances, were compelled to pay the full list prices. It has often been possible, in recent years, for such competitors as were considerable consumers, and who were familiar with the conditions and knew how to bargain to advantage, to buy tin plate from the so-called "independents" at some cents below list figures. This was especially true, of course, at times when the demand for tin plate was relatively small.

The amount of reduction they could secure depended upon circumstances and frequently, probably usually, has been less than the amount of defendant's preferential. It has only seldom been more. The effect of such a bargain as that which long subsisted between the defendant and the Tin Plate Company may be very far-reaching. For years the defendant was under contract to sell the largest fruit packers on the Pacific Coast cans cheaper than it sold them to anybody else. For eleven years it bought its tin plate from the Tin Plate Company under an agreement by which it got it at a lower price than any other consumer. The Tin Plate Company itself is a subsidiary of the United States Steel Corporation. To make the chain complete, all that would seem necessary would be a company which operates a large number of wholesale and retail grocery stores, and to have that concern make a bargain with a canning company enjoying the special preferential rates. Whether such a chain, if established, would do any harm, this record does not require to be decided, and furnishes little data upon which such a decision could be based. As already stated, the preferential ended in April, 1913, some seven months before this suit was brought. The defendant still buys its tin plate at prices lower than the quoted list prices of the Tin Plate Company; but it no longer has a right to require the Tin Plate Company to allow it such a reduction below any price at which the Tin Plate Company may sell to others. The Government claims that its investigation of the status of the defendant had begun before April, 1913, as the defendant knew. It says that the change in the agreement was the result of such knowledge. The preferential contract had, however, in fact been terminated before this suit was brought. It will be unwise to decide as to the legality or illegality of such an agreement in any case which does not make it necessary to do so. If any such exclusive privileges have been granted in form or in fact since the 15th day of October, 1914, they will be subjected, not only to the provisions of the so-called "Sherman Act," but also to those of the second section of the act of the date mentioned (act Oct. 15, 1914, c. 323, 38 Stat. 730), in so far, if at all, as the same may be applicable.

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MAKING CANS FOR ONE'S OWN USE.

[886] The Government further charges that, because the defendant buys its tin plate cheaper than anybody else, it has extended its control over the can trade by selling cans to packers who make their own, at prices lower than those at which they can make them. Unquestionably, defendant has sold cans to some users at prices which made it cheaper for such users to buy from it than to make their own cans. It does not appear that in any of these cases the defendant sold its cans below its regular list prices, and, in most of the cases in which users found it more profitable to buy from it than to make their own cans, the situation would have been the same had it paid the same price for its tin plate as everybody else. Had it paid as much as other can makers for its tin plate, it might have charged more for its cans. If it had done so, there are doubtless instances in which it would still have paid some canners to make their own cans, although, at the price which actually prevailed, it did not.

The ordinary packers' cans are not hard to make. They do not require a high degree of skill in the workmen. While the cost of the best machinery for making them is now much greater than it once was, it is, after all, not very large. Nevertheless there are many packers who are not able to make their own cans as cheaply as they can buy them, either from the defendant or from its competitors, or else do not save enough by making them to lead them to think it worth while to take the trouble and risk of so doing. The fact that in a number of instances can users have ceased to make their own cans and bought them from the defendant proves little. Sometimes it is true the defendant has purchased the can-making machinery belonging to such consumers of cans. The amount paid may not infrequently have been more than the machinery would have brought in the open market. It does not ever appear to have exceeded the cost to the customer and usually was less. In such transactions, it is difficult to see anything that might not well be done by any can maker who thought he could thereby for some years secure the patronage of a large customer.

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DEFENDANTS' CONCEALMENT OF ITS CONTROL OF ITS SUBSIDIARY COMPANIES.

The Government's petition charges that the defendant has concealed its control of some of its subsidiary companies, and has caused them to be carried on as if they were among the number of its independent competitors.

An attempt was made to show that this was the case with the Sanitary Can Company and the Union Can Company of Rome, N. Y. The stock of each of these concerns was bought by the defendant in 1908. At that time public announcement was made that the defendant had acquired an interest in them. It is true that the extent or character of that interest was not stated, and that the defendant maintained the separate corporate existence of each of them and operated them largely through their own officers and employees; that, under such circumstances, these companies have since advertised their wares without saying anything about their connection with the defendant scarcely furnishes ground for criticism.

[887] The like cannot be said as to what it did or caused the American Stopper Company to do. Since 1905, that company has been a subsidiary of the defendant. The fact was not publicly disclosed until 1909. During the intervening four years, the Stopper Company advertised itself as the largest maker of tin boxes "outside of the trust;" the trust, of course, being the defendant. Deliberate deception was also for years employed to conceal its ownership of the Union Stockyards Can Company of Chicago. Defendant's control of this concern dates from November, 1906. Down until the close of 1909, if not longer, it was operated as an independent company. During this time one of the defendant's high officers conveyed its orders to the nominal head of the dependent company. By his directions, the connection between the two was kept secret. There were those in the trade who, nevertheless, guessed that there was some relation between them; but, as its manager testified, he lied down their suspicions. The reason for all this mystery was the usual one in such cases. The defendant wanted to use the Stockyards Can Company to fight its general line competitors in the Chicago district, while still maintaining its

own prices. The manager of the subsidiary testified that, if he could get the trade of such competitors without cutting prices, he was told to do so, but, if a cut was necessary, he was to make it.

There can be no question as to either the moral or legal character of such methods. Laying aside all ethical considerations, the wonder always is that a great company like defendant does not see that it cannot afford to be caught in such a position, and, in the long run, caught it is likely to be. The loss of dignity and prestige in the public eye must usually cost more than was gained, even if nothing worse happens. It is like enough to suffer from lowering the moral tone of its own employés. The practice referred to, however, ceased three years or more before the institution of these proceedings.

SUBSEQUENT PURCHASES OF CAN PLANTS.

The Government charges that defendant, since its organization, has, by purchasing a number of competing plants, continued its attempt at monopoly. Defendant has bought control of 12, 2 of them before January 1, 1903, the other 10 between April, 1905, and June, 1909. None was taken over in the 4½ years immediately preceding the filing of the petition.

The first bought was that of the Andrews-Bones Company of Omaha. It was a small concern. The price paid was little above its apparent value. The transaction was without significance.

The lease of the factory of the Union Can Company of San Francisco for a term of five years from January 1, 1903, was a more important transaction. Norton had sought an option upon it. He failed to get it, because the California Fruit Canners' Association, which was and is a large consumer of cans, in self-defense, as it thought, bought 60 per cent of the company's stock. About a year after defendant's organization, it and the Canners' Association reached an understanding. The association then agreed that for five years it would buy all [888] its cans from defendant. The latter promised to charge every other can-

ner on the coast, with two exceptions, $1 a thousand more than the association paid, the discrimination against the two exceptions to be but half as great, or only 50 cents a thousand. The association has apparently ever since bought its cans from the defendant. The lease of the Union Can Factory was one of the terms of the alliance between defendant and the association. Somewhere about 1908 that plant was abandoned. The defendant bought some of its machinery; the rest was stored.

It is unnecessary to inquire closely into the nature and effect of this incident or series of incidents. Giving them all the significance for which the Government contends, they show nothing more than that as late as January 1, 1903, defendant was still attempting to accomplish its original illegal purpose, although it was working to that end with much less thoroughness and system than it once had used.

The next purchase, made in the spring of 1905, was that of the American Stopper Company, of Brooklyn. That and the acquisition of the Union Stockyards Can Company, of Chicago, in November, 1906, were made in part at least with the purpose of using those concerns in one of the least defensible ways in which powerful corporations have waged war upon their competitors. In each case, as already stated, the fact of defendant's ownership was for years denied, and one, if not both, of these subsidiaries was put to the same use as the fighting ships which figure in *United States* v. *Hamburgh-American S. S. Line*, 216 Fed. 971. From any other standpoint the purchase of the Union Stockyards Can Company was unimportant. It was a feeble concern, without any apparent power to continue effective competition.

The Stopper Company was a much stronger organization. Its origin was modest enough. It was formed in 1900 to make, as its name indicated, bottle closures. In 1901, after the organization of the defendant, it began manufacturing decorated tin boxes. Its going into this line was in part the result of the high price to which defendant had at that time raised the price of cans. The Stopper Company's business grew and flourished. In 1905, when its real estate and machinery were worth perhaps a quarter of a million,

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its annual consumption of tin was about 20,000 base boxes a year.

In November, 1905, the Norton-Edgar Can Company was purchased. This concern was organized by one of the numerous Norton brothers. It manufactured paint and varnish cans principally. It started business early in 1903, and less than three years afterwards was sold out to the defendant. It never was prosperous.

In the month of November, 1906, the United Can Company and the Federal Can Company, both of San Francisco, and the Kendall Can Company of Astoria, were acquired. The two former were managed by a gentleman who had once been in defendant's employ. In May, 1904, he and his associates bought the United Can Company. It was then a small concern. Under their management it flourished, and by 1906 was selling 40,000,000 cans a year. They took over the property of the Federal Can Company, and with it certain exclusive licenses to operate in the Pacific Coast States under patents belonging to [889] the Max Ams Machine Company. The Kendall Company was a sub-licensee of the Federal Can Company. The purchase of these three companies and their exclusive licenses materially strengthened defendant's hold upon the can trade of the Pacific coast.

About January 1, 1909, the Union Can Company and the Utica Industrial Company, both of Rome, N. Y., as well as the New Hartford Canning Company of New Hartford, in the same State, were acquired. All three were closely allied. They were apparently controlled by Sanford F. Sherman, a brother of the late James S. Sherman, then Vice President elect of the United States. The New Hartford Canning Company was primarily engaged in the business of canning fruits and vegetables. Since 1880 it had made its own cans and sold the surplus. Norton had attempted to get it for the defendant, but had failed. The Union Can Company was not organized until 1906. The two concerns together annually consumed about 90,000 base boxes of tin plate, and sold about one-half of the packers' cans used in the State of New York. The Utica Industrial Company was principally en-

gaged in constructing machines under patents it owned. These patents were for the invention of one Charles W. Graham, who was in the company's employ, and who appears to have had quite a genius for developing automatic can-making machinery. The three companies were prosperous, but the volume of their business compelled them to borrow money. Mr. Sherman had to indorse their paper. He wished to be free of the burden. He opened negotiations with defendant and effected a sale for $275,000, a price apparently liberal, perhaps even generous, but far removed from the extravagant sums which defendant had formerly paid.

The New Hartford Can Shop and the machine shop of the Utica Industrial Company were dismantled, and some of the obsolete machinery of the former was junked.

It is perhaps worth while to note that of these 12 concerns only two made cans prior to March, 1901. Norton had tried to get both of them. He failed, because their owners were large can consumers and feared to surrender the control of their can supply. It is, of course, obvious that these purchases of a dozen plants during a period of some seven years do not even tend to show that the defendant from 1902 to 1909 made any attempt to secure all or a greater part of the can-making plants of the country, as in 1900 and 1901 Norton and those for whom he acted did. In many, if not in most, of the cases in which the defandant did buy, the sellers sought it. The effect of the purchase was the same, no matter who began the negotiations; but, in judging defendant's intent, the fact that the owners came to it, and not it to them, is significant.

ALLEGED MONOPOLIZATION OF THE SANITARY CAN BUSINESS.

The defendant made one other purchase. It was in some respects more important than any or all of the others, for through it defendant secured the prominent place it still holds among the makers of so-called "sanitary cans."

A packer understands a can by that name to be one in which the whole top in one piece is put on the can after the latter has been filled [890] and in which such top is secured in such a manner that the medium used to seal it

hermetically does not come in contact with the contents of the can. Such cans had been used in Europe for years before the formation of the defendant. Max Ams was a firm engaged in the business of putting up canned fish, jellies, condiments, etc., and had a large export trade. Its European customers objected to the hole and top cans sealed with solder, then almost in universal use in this country. The rubber gaskets employed in Europe for sealing cans were not available here, and if they had been the time and cost of inserting them would have been a serious obstacle to their use. One of the firm invented a liquid compound which could, in connection with machinery, types of which had already been developed in this country, be used to seal the cans. About 1904, he thought his experiments had succeeded to an extent sufficient to justify him in exhibiting his methods at the packers' convention of that year. In 1902, the Max Ams Machine Company was incorporated and began to manufacture, or rather to adapt, machines for closing such cans. The defendants Bogle and Cobb were connected with the Cobb Preserving Company, of Fairport, N. Y. They became interested in sanitary cans and, at the instance of Ams, began to manufacture them on a larger scale than he was equipped to do. They were canners, and they made the cans for their own use and sold the surplus. The consumption of sanitary cans increased. In 1904, they organized the Sanitary Can Company, and thereafter their business in making and selling sanitary cans grew from about $150,000 to nearly $2,000,000 four years later. They had troubles. Things did not always work right. A good many of their cans were defective, or the packers did not know how to use them and claimed they were. They had to pay out large sums in damages. They branched out largely. They built additional factories in different parts of the country. The very rapidity of their growth imperiled their financial condition. Not only were the resources of the company itself strained, but so were those of the individuals largely interested in it. Along came the panic of October, 1907. The men at the head of the company, and who had indorsed its paper, became somewhat alarmed for their

future. They feared they had on hand more of a task than their means would enable them with safety to handle. They looked about for a possible purchaser. The defendant naturally occurred to them. The fact that it was the largest concern in the business made them, as a few months later it made Sherman, turn to it. In periods of stress, it frequently happens that the largest competitor in any line of business is the only possible purchaser for one of its smaller rivals, who has become financially involved. As, for example, the United States Steel Corporation was the only concern which could in a hurry and in a time of panic buy the Tennessee Coal & Iron Company, when those interested in the latter had to have instant relief. The largest organization in any line of business may not unnaturally grow otherwise than by the use of what ordinarily would be thought of as its competitive advantages. The fact that any of its competitors who feel they must sell are most likely to make it the first offer, and that usually acceptance is for it a far less se[891]rious matter than it would be for almost any one else, is one of the causes which contribute to such expansion.

At the same time, defendant entered into certain contracts with the Max Ams Machine Company, by which it secured for some years the exclusive right to use the latter's closing machines. Of what significance are these transactions? The defendant, before they took place, had begun the manufacture of sanitary cans, which of course were sold in competition with those made by the Sanitary Can Company. Those cans were coming into public favor. Defendant might, even if it had not been already far and away the most powerful factor in the entire can trade, have wished to secure plants which made a specialty of such cans and were fitted for their manufacture. In short, had it not been conceived in the sin of defying the Anti-Trust Law, such a purchase could hardly have been said to show an intent to restrain competition or promote monopoly.

The weight which should be given to these various purchases and to the fact that similar transactions are like enough to take place in the future, whether defendant spe-

cially wishes them or not, may be most profitably considered in connection with the Government's contention that the defendant's size and power is so great that through them it dominates the industry, and, because such size and power were in the first place illegally acquired, the court must now take them away.

PRICES OF SANITARY CANS.

The Government charges that, through the control the defendant has acquired over the sanitary can business, it is able to exact, and does exact, for those cans a higher price than for other kinds of packers' cans, although they cost no more to make. Sanitary cans are sold at higher prices than packers' cans of like sizes, and it is probably true that they are no more expensive to manufacture. It is, however, the custom of can makers to furnish to purchasers of such cans can-closing machines at nominal, or at all events at very low, rents. There has been in the last few years a rapid improvement in these machines. Those in use one year frequently became obsolete a year or two later. It is therefore quite possible that the margin of profit on sanitary cans is in fact no greater than on the old hole and top cans. It would not be surprising, however, if the reverse were true. In most lines of production, greater profits are made on comparatively new things than on those which have been known and used for many years. It does not appear that any special significance should be attached to the figures at which sanitary cans are sold.

The Government alleges that, ever since the defendant was formed, it has controlled, and at times has increased, the general market prices of cans. It is charged that not only does it fix the price of the output of the plants controlled by it, but that so great is its predominance in the industry that those prices are followed of necessity by the independent manufacturers, and thus all substantial price competition is eliminated. It is said that defendant has exercised, and at

the time of the filing of the petition was still exercising, this control to lower [892] or raise unduly and arbitrarily the price of its product. There is no question that since 1901 the defendant has very largely fixed the price at which packers' cans have been sold throughout the United States. It has competitors who now sell approximately one-half the cans which are sold in the country. There is no evidence of any price agreement between it and them. There is no reason to think that there is on this subject any understanding of any kind, however vague or indefinite. Nevertheless, the prices it fixes are the standard prices from ocean to ocean and from the Lakes to the Gulf. It is impossible, except under very peculiar circumstances in extremely limited amounts, and during the shortest periods, for anybody to get more for packers' cans than defendant charges. Its largest competitor is the Continental Can Company. The latter sells nearly one-fourth of the cans not sold by defendant. So far as packers' cans are concerned, it appears always strictly to follow the defendant's prices. The record mentions a few instances of alleged price cutting by the Continental Can Company. These instances are so rare and so obviously opposed to the general trend of its policy that it appears probable that with one exception the witnesses who testified as to them misunderstood the facts or did not accurately recall them. It did sell the makers of the Campbell's soups, who were very large consumers, at perhaps 20 cents a thousand below defendant's prices. The Continental Can Company was organized in 1904 very largely by the Edwin Norton who played so conspicuous a part in starting the defendant. There is no evidence that the Continental Can Company's strict adherence to the prices fixed by the defendant is the result of any agreement or understanding. It is possible that it is due entirely to the belief of the well-informed managers of the Continental that a trade war carried on by cutting prices would not be to its advantage. A number of the smaller competitors of the defendant, concerns the total output of each of which does not exceed perhaps one-twentieth of its, sell their cans at defendant's prices when they can, and, when they cannot, they cut those

prices anywhere from 25 cents to $1.50 a thousand. They never drop much lower. It may be that their cost of production prevents. It may be that, if they named prices sufficiently attractive to draw much trade from defendant, they would get more than they could handle. If they attempted rapidly to extend their facilities, a sudden drop in defendant's prices might catch them in a position in which they would be in deadly peril of financial ruin. They never name their prices for the year until the defendant's have been made public. On the other hand, the potential, if not the actual, competition to which defendant is exposed, prevents it from arbitrarily fixing its prices at a higher figure. The experience which it had at its formation has taught it that such a course is, from its own standpoint, unwise and may be disastrous.

It is not possible to arrive at a definite conclusion as to the prices of general line cans. They are of many different sorts, sizes, and shapes. Each user is likely to insist on a can adapted to his particular requirements, real or fancied. The publication in advance by the defendant, or by anybody else, of prices for such cans, would be im[893]practicable, and, in fact, is never attempted. The consumers make their own bargains with the various can factories in what manner and for what length of time best commends itself to their judgment.

The evidence shows that sometimes the defendant offers general line cans at prices lower than any of its competitors, and sometimes one or more of its competitors names prices below its. While as a result of defendant's size and the wide distribution of its factories its action is perhaps the most important single factor in determining the price of general line cans, it does not fix and control the prices of such cans to anything like the extent it does those of packers' cans.

HOW FAR DEFENDANT HAS SERVED THE INDUSTRY.

Thus far consideration has been chiefly given to the Government's charges against the defendant. Some of these have been held not well founded. It has been said that others are made out.

Defendant has directed much of the nine volumes of testimony it has offered to show that, whatever criticisms might be made as to the way in which it was formed, and to certain of its isolated acts since, it has, on the whole, served the can trade well, and that its dissolution would do harm and not good. There is no room for question that since 1901 there have been many improvements, not only in can making, but in can selling and in can delivery as well, and that these improvements are greatly appreciated by all who buy cans from can makers. There is the usual difficulty, in such cases, in telling how much of these good things are because of that which defendant has done and how much would have come about if defendant had never been thought of.

THE TENDENCY OF CAN PRICES.

By 1904, if not earlier, the defendant had definitely abandoned the policy of charging prices which to the consumer seemed unduly high. It is natural, nevertheless, to ask whether since that time prices have been lower or higher than they would have been had it never come into being. The record does not give any certain answer to this question. A great many consumers of cans testified that the price has tended downward. Up to the time of the closing of the evidence in this case that was generally true. There were fluctuations, and the downward trend was slight; but there was such a trend. A comparison of the price of tin plate and of cans from 1897 to 1913 shows that the prices of the latter for 1911, 1912, and 1913 were just about the same as they were in 1897, 1898, and 1899, when allowance is made for the difference in the cost of the former. The margin between the cost of the tin plate and the selling price of the cans seems to have been as great when, as now, cans were made and sold at prices fixed by the defendant, as it was when they were made and sold by its numberless predecessors in the business. The cans have been better, in that they have been more uniformly well made. With the machinery now in use there is no reason to think it costs appreciably more to make good than bad cans. The manufacturing cost is now less than it was before defendant's formation. It is

true that each [894] laborer employed now receives more wages than he did then, but so great has been the improvement in machinery that the actual labor cost per thousand cans is now materially less than it was 15 years ago. Moreover, as a result of better methods of manufacture, much less solder is now used, and a net saving of some importance is thereby effected. A reduction in the price of cans does not appear to be among the benefits the defendant has conferred upon the trade.

STANDARDIZATION SIZES.

Defendant takes some credit to itself for bringing about a standardization in packers' cans, so that a No. 1, a No. 2, or a No. 3 can, of any one of the recognized types of openings, is now precisely the same, no matter from what shop it comes. A good deal of progress in this direction had been made before defendant was organized. The first effect, not of its formation, but of the policy adopted by it in its earlier history, was probably to retard rather than to accelerate this tendency. The prices it quoted brought about, as has been seen, an opening or reopening of a number of shops poorly fitted to make good cans. The owners of such establishments probably gave little thought to standardization or to any similar problem. Subsequently, the influence and example of defendant made greatly for uniformity. It is, however, probable that, even if it had never come into being, the pressure from the canners and other sources would ere this have resulted in the general establishment of the standards now in use. It is very possible that it would have taken longer than it did.

BETTER CANS.

Defendant makes good cans. It has always done so, at least after the first few months of its existence. The impression produced by the testimony is that it has been more uniformly successful in so doing than perhaps any of its competitors, although the larger and more responsible of these have, in recent years, habitually turned out thoroughly

satisfactory packers' cans. The same may be said as to the more generally used of the general line cans, such as those for coffee, lard, or varnish. When it comes to designing and making cans to meet special wants or peculiar tastes, conditions are somewhat different. The defendant has usually at its command a wider range of expert capacity in dealing with the problems which may arise, although of course on any special occasion, any one of its rivals, even a very insignificant one, may happen to solve them more satisfactorily. It has a more varied line of machinery. It is its policy to spare no trouble nor, within reasonable limits, expense to meet its customers' wishes. It is therefore not surprising that some users of certain sorts of general line cans feel that it can be safely depended on to make what they want. Some of them have reason to believe, or to know, that not every one of its competitors can be, and, as they are not certain that any of them can, it gets the business at the same or even a little higher price. Many concerns use many different kinds of cans. Some, but by no means all, of these, like to have all their cans from the same maker. In such cases it not infrequently happens [895] that the defendant is the only one who will, or perhaps can, bid on the whole order.

It is impossible to say how much of the improvement in the quality of cans and in adapting them to varied uses is due to the defendant, and how much to other causes. It is, however, certain that its influence has been an important factor in bettering these conditions.

PROMOTION OF SCIENTIFIC STUDY OF CANNERS' PROBLEMS.

The defendant claims, with much reason, to have been the first of the can makers systematically and scientifically to study canners' problems with a view to discovering the causes of damage to and deterioration in canned goods. It says it has done more in that direction than any of its competitors, or all of them together. A number of years ago the defendant established a laboratory for the investigation of such matters. It has always been ready and willing to use the resources of this laboratory to aid canners, without

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expense to the latter and whether they bought their cans from it or not. When, some years ago, the National Canners' Association made up its mind that it would like to establish and maintain a well-equipped and efficiently managed laboratory at Washington, the defendant, and, for that matter, its principal competitors, furthered the project by contributing liberally, apparently in some rough proportion to the number of packers' cans sold by each.

CONTRACTS FOR SEASON'S SUPPLIES.

From the canner's standpoint, the most important respect in which the condition of the industry has, since 1901, changed for the better, has been the practically universal substitution of the agreement to supply all cans needed by a packer during a particular season for the theretofore existing practice of contracting for a definite number of cans. This change has been highly beneficial. It would have been difficult, if not impossible, to have brought it into general use, so long as the can factories were on the average as small as they were in the last century. All the larger and stronger can makers in the business now follow it. As has already been intimated, it may be doubtful whether some of these could safely do so to-day if they did not feel that, even in seasons of unusually and unexpectedly large crops of canable products, the defendant would be able and willing to supply their customers at reasonable prices with any cans which they might not be able to furnish.

PROMPT DELIVERIES.

Almost every canner of food products, out of the hundreds who have testified in this case, and many who use cans for other purposes, are emphatic as to the supreme importance of prompt deliveries. Many users of cans have limited storage facilities. They can not take in many at a time. A delay in the arrival of cans may mean to them the entire loss of the product which was to be packed. Fire, flood, or other accidents may put a stop to the operation of any one can fac-
[896] tory. The defendant has many shops, most of its competitors but one. The probability of its delivery of cans be-

ing altogether prevented by a factory accident is therefore almost negligible. Prompt delivery at short notice can not, however, be assured unless the can factory is near the place of consumption. If there is a long railroad journey between, accidents and mistakes on the lines may postpone the arrival of cans which have been shipped in due season. The testimony shows that for this reason users of cans often prefer to deal with a neighboring factory, whether of the defendant or one of its competitors, in preference to buying cheaper elsewhere. The defendant has always given special attention to insuring prompt deliveries, and apparently has been rather unusually successful in so doing. Moreover, it stands ready to do its best to furnish cans on the shortest notice to any one who wants a car-load or many car-loads, and at its published prices. The failure of prompt delivery from one of its factories, or from a factory of one of its competitors, is no longer by any means so serious a matter as such an event formerly might have been. From one or the other of its shops the defendant is usually able in brief space to place the cans where they are needed. No concern which had not a number of plants and ample resources, both in men and money, could have done what the defendant has accomplished in protecting can users against serious delays in delivery. Perhaps this has been its most valuable service to the trade.

STORAGE AGREEMENTS.

Cans are bulky articles. In most sections of the country the packing season lasts but a few months and in some but a few weeks. Can factories can, of course, make the best use of their facilities by running on full time all the year round; but if they do, they must provide expensive storage facilities for the cans they make in the six or eight months of the year in which there is little or no use for them. When everybody wants them at once, loading and switching facilities are likely to be overtaxed. On the other hand, all canners necessarily have to have some place in which to store part of their products until they are able to sell them. Such space may well be used before the packing season for the storage of empty cans. At some packing houses, storage facilities are

limited; at others they are quite extensive. A packer of the latter class can, early in the year, conveniently take in a part at least of his season's supply. Before defendant's day, can makers sought to induce packers to do so by selling cans for winter delivery at decidedly lower prices than they would make if the cans were not to be shipped until summer. Many packers were not and are not able to avail themselves of such a proposition, which, moreover, is now less attractive than it formerly was, because the difference between the off season's and mid-season's prices is, as a rule, much less than it was 17 years ago. Many packers can not take in their cans long before they expect to ship out their finished products, because, by the custom of the trade, cans are sold for cash on delivery; that is, they are shipped draft with bill of lading attached. It has now been for some years the practice of defendant and some of its stronger com[897]petitors to solve the problem, in part, by storing upon the packer's premises the whole or a part of his season's supply. The arrangement takes the form of a lease by him to it of storage room. The rent it pays is usually nominal, although in a few cases it has been a little more than nominal. The defendant then ships its cans to the customer, who stores them as its property in the warehouse, or part of the warehouse of which it is in form the tenant. When he needs the cans, he takes them out in car-load lots and pays for them. Then, and not until then, do the parties intend the title shall pass to him. The arrangement is one which should be useful to both parties, and particularly so to the canner if he happens to have limited capital or credit. He gets a supply of cans before he needs them. He is to that extent independent of can factory or transportation accidents. The can maker, at little or no cost, largely increases its storage facilities. The defendant may not have originated this plan, but it has extensively used and popularized it. Perhaps its only disadvantage is that it tempts canners, who are financially weak, to use cans before they pay for them, and to conceal the fact by making false reports as to the date upon which the cans were used. Sometimes bankruptcy or insolvency follows, before the cans are paid for, and various legal as

well as moral complications result. On the whole, however, there can be but little question that the practice has been both convenient and economical.

GOOD FEELING IN THE TRADE.

A man or an institution may be of great service to the community, or to a portion of it, and still be very unpopular in it. He is likely to be if those who are served feel themselves compelled to do things, even although those things are for their own good. The evident good feeling between defendant and its customers and competitors proves that neither can makers nor can users feel that for a number of years defendant has tried to force them to do anything. The defendant asked a great many witnesses, a hundred or more, doubtless, whether they thought its dissolution would be desirable. None of them answered yes. Some of them did not know whether it would be or not. An overwhelming majority testified that such a dissolution would be hurtful to the industry. It is true that not many of them who so said could give convincing or conclusive reasons for the opinion that they expressed, but the fact remains that nobody in the trade feels that the defendant is hurting anybody, or for a number of years past has hurt anybody, or has tried to.

Consumers of cans were, when the testimony was taken, paying less money for cans than they had frequently paid in the past. Few of them were aware that this reduction in price was due almost entirely, if not entirely, to cheaper tin plate. Prices were relatively stable. They fluctuated as to most kind of cans scarcely at all within a year, and usually but little from year to year. Users were practically certain of being able to get what cans they wanted when and as they wanted them. In short, defendant having great facilities habitually used them to give intelligent, courteous, and kindly aid. It is unmistakably popular in the trade.

[898] The Government might properly reply that those who buy cans do so for the purpose of selling their products in them. So long as they are certain that their competitors are not getting cans materially cheaper than they

are, so long as they are not exposed to violent fluctuations in the prices, they are not much concerned as to whether cans could be a little cheaper or not. Their attitude of mind is perhaps illustrated by one witness who said he could make his own cans, and, as he figured out, he could make them cheaper than he could buy them; but, if he did, all his competitors would do so. Prices of their wares to their customers would go down, and in the end he would have the trouble, worry, and responsibility of making his own cans with no larger net profit. His attitude is natural enough, but it shows that the protection of the ultimate consumer can not always be left to the middleman.

The competitors of the defendant are satisfied. It apparently is willing to sell cans at a price at which they can compete with it and still make money. As has sometimes been suggested, it seems to hold an umbrella over them. They have no cause to complain. They are growing, most of them. All the more important certainly are.

DEFENDANT'S SHARE OF CAN TRADE.

In 1913, in round numbers, one-third of the cans manufactured in the United States were made by people who used those they made. One-third was made by the defendant, the other one-third by other people who, like it, made cans to sell. There has been much testimony taken and a great deal of controversy as to whether the cans made by people who made them for sale, other than the defendant, were more or fewer than those made by it. Into that question it is not proposed to go. For all practical purposes, one made about as many as the other. It is not perceived that the decision of this case or of any material issue in it can possibly turn on whether the aggregate of cans made by defendant is a few million more or a few million less than the aggregate of those made by all other persons who make them for sale.

It is probable that, when defendant was first formed, it took over factories which at that time, or a few months earlier, made in the neighborhood of 90 per cent of the cans manufactured for sale. In the first few months of its ex-

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istence, competitors sprang up like mushrooms. The record does not give us any figures as to the aggregate volume of business done or cans made by defendant's competitors, except for the year 1913. At that time, as already stated, they sold about one-half, a little less or a little more, as you choose. The progress from year to year of some of the larger concerns is shown. The percentage of their growth has usually been higher than that of defendant, sometimes much higher; but we know nothing accurately of various concerns that made and sold cans at various times since 1901, but who no longer do so. As has already been stated, some considerable competitors have since 1901 been absorbed by the defendant. The latter's consumption of tin plate for each year from 1903 is stated in the record. The country's total production of such plate for each of those years is also given. The figures of the ex[899]port of such plate do not appear to be stated, but they are easily obtained from the official statistical abstract. It is true that in such abstract the exports and imports of terne plates are not separate from those of tin plate, although the domestic production of each is separately given. Assuming that the same proportion of terne as of tin plate is exported and imported, the amount of tin plate retained for consumption in each year can be ascertained. Any possible inaccuracy in the assumption made as to the amount of terne plate going into foreign trade can not appreciably affect the percentage of the total amount of the country's consumption of tin plate properly chargeable to defendant. This proportion varies somewhat from year to year. It was as low as 27.9 per cent in 1906, and as high as 34.5 per cent in 1911. The latter was a year in which there was an unusually large demand for packers' cans, a demand which the defendant seems to have been able to meet more readily than its competitors. Doubtless some of the apparent fluctuations from year to year are occasioned by the fact that the tin plate retained for consumption in any particular year may be more or less than the amount which in the same 12 months is actually consumed. However, as the defendant in each of the years 1903 and 1904 seems to have used about 30.7 per cent of the total tin plate retained for domestic consumption, and in the year 1912, 29.9 per

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cent, and in 1913, 30.3 per cent, or an average for the two years of 30.1 per cent, it may be said that in a decade there has been no appreciable change in the proportion of the country's tin plate which defendant has consumed. Of course, not all the tin plate goes into cans, but almost all of it does.

CANS MADE FOR USE, NOT FOR SALE.

About one-third of the cans made in this country are made by concerns who themselves use them. The Government says that, in determining the degree to which the defendant has succeeded in monopolizing the trade, such cans should not be taken into account. The defendant as strenuously insists that they should be. As a technical proposition, the Government would seem to be right. Cans made by persons who use them are not as cans traded in. In considering the cans which as such form part of the commerce of the country they may be excluded, and indeed, from that standpoint, must be.

If an attempt was made in a particular city to combine all the bakers, and such attempt was successful, it would probably be held that a State law, couched in the same phraseology as the Federal Anti-Trust Act, except that it would be restricted to intrastate commerce, would be violated, in spite of the fact that in that city one-half or two-thirds or even three-quarters of the bread consumed was actually baked in the kitchens of private families.

Yet the fact that one-third of the cans used in the country are made by the people who use them is one of great significance. It shows that any considerable rise in the price of cans, due to other causes than the increased cost of production, or of raw material, would probably lead to two things: First, a number of the well-equipped can factories which now confine their production to the needs of [900] their owners would begin manufacturing for the general trade; and, second, many other consumers of cans, who now buy them, would then begin to make them for themselves. Such a possibility imposes a check of no mean efficiency upon the actual power of the defendant greatly to raise the price of cans.

The number of consumers who formerly made their own cans was both absolutely and relatively greater than it is to-day. Small canners, except under peculiar conditions, such as those with which the Alaskan salmon canneries have to deal, no longer make them. On the other hand, so far as one may make a guess from imperfect data, it is probable the proportion of all kinds of cans made by those who used them is nearly or quite as large as it was 15 or 20 years ago. What has happened has apparently been that there has been a great increase in the consumption of cans, not only for packing fruits and vegetables, but for many other purposes, and that especially for those other purposes the consumption of particular factories or companies has become very large, and that a number of these find it to their interest to make their own cans.

The Government contends that the defendant's real predominance in the trade is much greater than the figures and percentages show. It says a good many of the cans which swell the total of independent producers are made in small shops or factories which survive solely because they are individually insignificant, and cater to an almost purely local trade which deals with them because they are at hand. Such concerns are not competitors of defendant in any very important sense. Some, or many, of such shops would always contrive to live, no matter how complete defendant's domination might be in every sense which counts. All this may be and doubtless is true, but that they do still exist, and might live under conditions still more unfavorable, is a fact which must be taken into account in determining how unlimited defendant's domination of the industry is or can become. That there are such small factories, and they serve a real need, is one of the reasons assigned by a number of witnesses why in their opinion a true monopoly in can making is impossible. It does not even to-day take very much money to go into can making, and if one has industry, character, some little ability, and a fair average of luck, to stay in it. The instant defendant attempts to exert oppressively its great influence in the trade and what may be conceded to be its present domination over prices, these small shops would extend their output and many others would be opened.

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EARNINGS OF DEFENDANT.

It is not well, in dealing with such great and many-sided problems, to ignore any of their conditions, even those the immediate legal bearing of which may be obscure, or even apparently non-existent. The defendant's financial condition for some years after its formation was none too good. The mistakes of the promoters had been too serious. Before the petition in this case was filed, it had greatly improved. By the time at which this opinion is written, it has fared so well that the day seems near at hand at which all arrears of the [901] cumulative dividend of 7 per cent per annum on its more than $40,000,000 of preferred stock will be paid. It would be unwise, in the present state of speculative optimism, to attach undue importance to the prices which are quoted for securities of companies which have, or are said to have, war orders. Yet it is a fact that the common stock of the defendant, which when issued avowedly represented nothing more substantial than hopes, is now selling at something like $60 a share and the preferred at $110. The plants which were taken over at and about the time of defendant's formation could have been duplicated for probably not exceeding $10,000,000. $7,000,000 of cash went into its treasury. At present prices, the securities which represent the original $17,000,000 will sell for $68,000,000, or four times as much. This $51,000,000, or so much of it as will remain when prices are more nearly normal than they are now, has been earned in supplying an article, the ultimate consumers of which comprise almost every individual in the entire population. The poorest and most struggling of the people are relatively, to their total expenditures, large consumers of canned goods. It is true that in the countless steps and many processes which come between the original producer of the fruits or the vegetables or other things which are canned, and the ultimate consumer, there are costs, charges, and profits which in the aggregate far exceed the fraction of a cent a can which the last analysis represents, even as things are and have been, the defendant's gross profit on the sale of each container. If defendant had never been formed, no one can be sure that cans would now be lower.

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CONCLUSIONS.

One who sells only one-half of the cans that are sold does not, of course, possess a monopoly in the same sense as he would if he sold all or nearly all of them. Yet he may have more power over the industry than it is well for any one concern to possess. No one can say with any certainty that anybody would be better off if defendant had never, in any way, restrained or controlled absolutely free competition in cans. All that can be argued is that, in view of the declared policy of Congress, the legal presumption must be that which was done was against the public weal.

If it be true that size and power, apart from the way in which they were acquired, or the purpose with which they are used, do not offend against the law, it is equally true that one of the designs of the framers of the Anti-Trust act was to prevent the concentration in a few hands of control over great industries. They preferred a social and industrial state in which there should be many independent producers. Size and power are themselves facts some of whose consequences do not depend upon the way in which they were created or in which they are used. It is easy to conceive that they might be acquired honestly and used as fairly as men who are in business for the legitimate purpose of making money for themselves and their associates could be expected to use them, human nature being what it is, and for all that constitute a public danger, or at all events give rise to difficult, social, industrial, and political problems.

[902] The law wishes that industrial and trading corporations shall operate under the checks and balances imposed by free and unrestrained competition. Doubtless, no one is blind to the evil which such competition itself brings with it, precisely as no thoughtful man can close his eyes to the difficulties which some of our constitutional checks and balances put in the way of securing an ideally efficient government. Congress wished to preserve competition because, among other reasons, it did not know what to substitute for the restraints competition imposes. It has not accepted the suggestions of some influential men that the control of a certain percentage of industry should be penalized. It has not yet

been willing to go far in the way of regulating and controlling corporations merely because they are large and powerful, perhaps because many people have always felt that government control is in itself an evil, and to be avoided whenever it is not absolutely required for the prevention of greater wrong.

The problem presented by size and power is one of such far-reaching difficulty that Congress has said, while it does not see how to deal with them when acquired in the legitimate expansion of a lawful business, it will prevent their illegitimate and unnatural acquirement by any attempt to restrain trade or monopolize industry. Perhaps the framers of the Anti-Trust Act believed that, if such illegitimate attempts were effectively prevented, the occasions on which it would become necessary to deal with size and power otherwise brought about would be so few and so long postponed that it might never be necessary to deal with them at all. In administering the Anti-Trust acts, a number of great and powerful offenders against them have been dissolved. So far as is possible to judge, the consuming public has not as yet greatly profited by their dissolution. It is perhaps not likely that any benefit could have been expected until in the slow course of time the ownership of the newly created corporations gradually drifts into different hands. In most of the cases in which dissolution has been decreed, the defendants had, not long before proceedings against them were instituted, done things which evidenced their continued intent to dominate and restrain trade by the use of methods which interfered more or less seriously with the reasonable freedom of their customers or their competitors.

As has been shown, defendant for a number of years past has done nothing of the sort. While it had its origin in unlawful acts and thereby acquired a power which may be harmful, and the acquisition of which in any event was contrary to the policy of Congress as embodied in the statute, it has for some time past used that power, on the whole, rather for weal than for woe. In this case, if a dissolution be decreed, it will have as its sole reason the carrying out of the policy of Congress that a trading or industrial cor-

poration shall not, by an attempt to restrain or monopolize trade, become so powerful that it exerts an influence on the industry far greater than that of any of its competitors. A court of equity, in deciding that it will so decree, will not consider whether public good might not be furthered by punishing those who do or try to do illegal things. To administer punishment is not within its province. To make clear the futility of such attempts, by striking [903] down all that has been done to that end, is as far as it can go. But here we are face to face with the fact that the court cannot undo much that has been done. During the 16 years which elapsed between the decision of *United States* v. *Knight*, 156 U. S. 1, 15 Sup. Ct. 249, 39 L. Ed. 325, and that of *United States* v. *American Tobacco Co.* 221 U. S. 106, 31 Sup. Ct. 632, 55 L. Ed. 663, much water ran over the dam. Until the opinion in the latter case was handed down, it doubtless would have been inexpedient for the Government to have begun proceedings against all combinations, a part of whose original motive was the restraint of trade and the bringing about of monopoly. Before such suits can be instituted, the Government must investigate. Such investigations, when simultaneously directed against many large concerns, disturb business. In postponing even such preliminary inquiries until after the Supreme Court had laid down the law, the Government was very likely wise.

Nevertheless, time has gone by. Conditions have changed. In this can industry it is absolutely impossible to put things back where they were on the 1st of March, 1901, and, if it were possible, probably highly undesirable.

The record shows that there are many ways in which a large and strong can maker can serve the trade, and a small one cannot. Perhaps it did not require much testimony to show that he who is strong and rich has more ability to serve than he who is poor and weak, provided always that there is an equal wish to do so.

Defendant once sought to emancipate itself from restraints of competition. Its power is great, but, as has already been pointed out, is limited by a large volume of actual competition and to a still greater extent by the poten-

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tial competition, from the possibility of which in the present state of the industry it cannot escape. Those in the trade are satisfied with it. They do not want it dissolved. Whether its dissolution would profit any one is doubtful. The first and immediate effect would almost certainly be the reverse, whatever larger good might in the end come from it.

I am frankly reluctant to destroy so finely adjusted an industrial machine as the record shows defendant to be. Yet the Government, too, has its rights, and has thus far been properly insistent upon them. The case most nearly in point is *United States* v. *International Harvester Co.*, 214 Fed. 987. There is in that case a strong dissent from a very able judge. Nevertheless, the decision of the court can not be lightly pushed aside.

The Government recognizes that the situation which existed before defendant was formed can not be restored. What it principally fears is that the defendant will, to the public prejudice, hereafter dangerously use the strength which it gained by its original lawbreaking. Defendant's reply, that in that event it will be time enough for the Government to act, does not fully meet the case. If this petition be dismissed upon its merits and without qualification, defendant might be entitled to claim in any future proceeding that nothing here in issue may be there used against it. Nor would a dismissal without preju[904]dice, as was proposed in Judge Sanborn's dissenting opinion in *United States* v. *International Harvester Co.*, *supra*, altogether meet the case.

An immense volume of testimony has been taken. Much of it could not be again secured. An attempt to do so would involve a useless waste of time and money. In this case counsel on both sides worked with tireless energy. And yet nearly 2 years elapsed between the filing of the petition and the argument in court. It has now been 4½ months since that hearing. The history of the defendant from its organization to the filing of the petition is now of record. It has been fully digested and briefed by counsel. This court has spent many months in its study and has reached, as has already been stated, many definite conclusions as to

facts. Why should all this work be wasted? If the defendant shall hereafter do anything which will justify or require the action of the court, there would seem to be no reason why the Government should not promptly get the relief, to which it would then be entitled, at little cost to anybody. That result can be easily obtained if a start may then be made from where we now are, which would be impossible if proceedings have to be begun all over again. A dislike for useless waste and destruction makes one loath to follow the authority which may be understood as requiring the breaking up of defendant's organization, in spite of its proved power for good, albeit with serious possibilities of evil. A like instinct rebels against taking any course which may hereafter involve this or any other tribunal's going again over any part of the ground which in this proceeding has once been covered.

Under the circumstances, would it not be better simply to retain the bill, without at present decreeing a dissolution, but reserving the right to do so whenever, if ever, it shall be made to appear to the court that the size and power of the defendant, brought about as they originally were, are being used to the injury of the public, or whenever such size and power, without being intentionally so used, have given to the defendant a dominance and control over the industry, or some portion of it, so great as to make dissolution or other restraining decree of the court expedient. It is, of course, not suggested that this court should or could undertake the regulation of defendant's business. Courts have no such power and no fitness for its exercise. What is proposed is, in default of a better way, of dealing with a somewhat unusual and very difficult condition. It is to be hoped that, before any occasion to act upon the power reserved shall arise, Congress will substitute some other method than dissolution for dealing with the problems which arise when a single corporation absorbs a large part of the country's productive capacity in any one line.

I shall take the course indicated, unless one or the other of the parties insist on my entering such a final decree as will enable them to seek at once a review by a higher

tribunal. If either of them does, I am not prepared now to say that they will not be within their rights, and that it will not be my duty to do what they ask. That question is reserved until the occasion for deciding it shall arise.

UNITED STATES v. AMERICAN CAN CO. ET AL.[a]

(District Court, D. Maryland. July 7, 1916.)

[234 Fed. Rep. 1019.]

MONOPOLIES 26(1)—SUIT FOR DISSOLUTION—DECREE.—Although a corporation has been adjudged in its inception to have been an unlawful combination in restraint of interstate trade and to have committed unlawful acts, whether a dissolution will be decreed rests in the discretion of the court; and where the unlawful acts have ceased, and in the judgment of the court the public interest will be best served thereby, the corporation will be permitted to remain intact and to continue its business, the court retaining the bill as a restraint upon its future operations.[b]

[Ed. Note.—For other cases see Monopolies, Cent. Dig. § 17; Dec. Dig. 26(1).]

In Equity. Suit by the United States against the American Can Company and others. Decree considered.

G. Carroll Todd, Asst. Atty. Gen., and *Henry E. Colton*, Sp. Asst. Atty. Gen., for the United States.

John Barton Payne, of Chicago, Ill.; *George R. Willis*, of Baltimore, Md.; and *Thomas M. Day*, of New York City, for defendants.

ROSE, District Judge.

Shall the defendant be dissolved? is the only question in which any of the parties are interested. On the record the Government may be technically entitled to other relief, but it would be of no practical value, if given, and no request for it has been made. For similar reasons, none of the defendants still before the court have thought it worth while

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[a] For prior opinion (230 Fed. 859) see *ante*, page 450.

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to insist upon their separate defenses. Upon the question at issue the opinion heretofore handed down said:

"Under the circumstances, would it not be better simply to retain the bill, without at present decreeing a dissolution, but reserving the right to do so whenever, if ever, it shall be made to appear to the court that the size and power of the defendant, brought about as they originally were, are being used to the injury of the public, or whenever such size and power, without being intentionally so used, have given to the defendant a dominance and control over the industry, or some portion of it, so great as to make dissolution or other restraining decree of the court expedient? * * * I shall take the course indicated, unless one or the other of the parties insist on my entering such a final decree as will enable them to seek at once a review by a higher tribunal. If either of them does, I am not prepared to say that they will not be within their rights, and that it will not be my duty to do what they ask. That question is reserved until the occasion for deciding it shall arise." 230 Fed. 859.

The defendant was willing to accept the court's suggestion, provided the Government would do likewise; but the law officers of the latter felt that, in view of the importance of the issues involved, the case should be carried to the court of last resort. The Government has, accordingly, moved for a decree of dissolution. The defendant has countered with a motion for an unqualified dismissal, or, in the alternative, for a dismissal without prejudice. For the reasons stated in the original opinion, defendant's motions will be denied.

In passing upon the Government's contention, little will be added to that which has already been said. Jurisdiction of a court of equity is remedial, not punitive. A dissolution may not be decreed, unless there [1020] is reason to believe that more good than harm will come of it. As a matter of course, in weighing the probabilities for good or evil, the chancellor must put aside any individual opinion he may have as to whether the community gains or loses by unlimited competition. The Anti-Trust acts voice the will of Congress that the competitive régime shall be maintained. In contemplation of the law, any restraint of competition unlawfully brought about does harm. It is the duty of the courts to give effect to the legislative will, but it is equally their duty so to shape their decrees as to bring

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about the result desired by Congress with the least possible waste of anybody's time or of anybody's money.

The Government asserts that, because of defendant's size and power, the checks and balances imposed by free and unrestrained competition do not limit its operation to anything like the extent they would if it were smaller or weaker, and that, if it be broken up into five or six separate and independent concerns, such checks and balances will come into play. In the long run such would doubtless be the outcome. The form of dissolution decreed might be such that the hoped-for end would be attained in a shorter time than apparently will be required in the oil and in the tobacco trades. Yet it is by no means certain, nor even perhaps probable, that between the various units into which the defendant might be divided sharp competition would at once spring up. The officers and managers of the new concerns would at first be men, most, if not all, of whom had been trained in the service of the defendant, and who in that service had acquired more or less uniform habits of mind and ways of looking at the problems of the business. It is likely that for a period greater or less in duration they would be disinclined to depart from the paths in which they had been used to tread. The mass of details with which such a dissolution would require them to deal would for some time absorb most of their energies of mind and body. A dissolution, if really thorough-going and radical, would necessarily cause a good deal of loss, and for a while entail unusual expenditures of many kinds. For the time being the power of any of the concerns to compete in ways advantageous to the consuming public would be largely curtailed.

Such considerations are important in themselves, but they might be held immaterial to the question in hand if any one of a number of other conditions existed, viz: If the defendant was using its power, prestige, or resources to deal unfairly or oppressively with its competitors or with the public, or if the maximum prices which it could hope to obtain for its wares were not limited within a rather narrow range by the actual competition to which it is exposed, and still more by the potential competition which a few months of

higher prices, under the conditions prevailing in the industry, would make real and dangerous, or if there was no probability that within a reasonable time and without the aid of judicial action, the comparative régime would again establish itself. But such is not the case. At no period after the first year or two following defendant's organization has the unfair or oppressive treatment of its competitors been a part of its policy. It is true that it concealed or denied its ownership of a couple of its subsidiaries. Nothing can be said even in excuse, much less in justification, of what it did in that way. Nevertheless those actions [1021] appear to have been exceptional, rather than part of any general scheme.

Its bargain with the Tin Plate Company may have operated unfairly to its competitors, and for a time probably did. The growth of independent manufacturers of tin plate, and various changes in the conditions of the industry, have in recent years made that advantage of little moment. The record seems to show that a number of years before the filing of the petition in this case the defendant made up its mind that it would not give its competitors or the public cause for complaint against it, and that it has since lived up to that resolution.

The defendant does fix the prices at which an overwhelming majority of the packers' cans are sold. It is the most potent factor in determining the price at which all of them are disposed of, but its power to do either depends upon its making a fairly accurate estimate of the market conditions. Any considerable increase in prices would promptly bring a host of new competitors into the field. It is neither certain nor probable that it will be able to maintain its relative position in the trade. The business and resources of some of its competitors have been steadily growing, both absolutely and relatively. A continuation of the present conditions may well result in the development of some of them until competition will again control the market. It is by no means unlikely that this result may be attained even earlier than the public could begin to enjoy the benefits which the Government hopes a dissolution would ultimately confer.

If, as has been suggested, jurisdiction over the case is retained, the assurance that the defendant will not resort to

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unfair practices will be well-nigh absolute. Under such conditions it will not be likely to accept a competitor's offer to sell out to it, and thereby add to that size and power which, acquired as they were, in defiance of law, the court must necessarily view with suspicion and distrust. Under such circumstances the passing of a decree for dissolution seems both unnecessary and unwise. The insistence that the court has no choice in the matter assumes that equitable modes of relief are fixed and rigid. That is not so. The glory of chancery has always been that it could mold its remedies to meet the conditions with which it has to deal. In this case it appears probable that all potential restraints upon free competition now imposed by the size and power of defendant will pass away as speedily without as with dissolution, and that dissolution will cause far more loss and business disturbance than will attend the gradual reestablishment of competitive conditions by the play of economic forces. If so, no dissolution should now be decreed.

It is, of course, possible that these forecasts of the future may not be realized. In that event, the retention of jurisdiction will enable the Government promptly and cheaply to compel a dissolution whenever anything which defendant may hereafter do, or whenever anything which may hereafter happen makes such action necessary or expedient.

It is, however, said that what the court has suggested it may not do, whatever else may be within its power. It is not denied that the course mapped out is well within the jurisdiction of the chancellor. The right to make decrees which are indistinguishable in principle [1022] from the one proposed has been recognized and exercised, but it would be of little moment if it had not been. The creative faculty of equity still continues to be energetic and productive. Bispham's Equity (9th ed.) § 583.

Conceding all this to be true, it is nevertheless asserted that no such decree could be properly made by a District Court of the United States. The argument is short. Such a decree is not final. No appeal will lie from any decree which is not. The court of first instance may not take away the right of review. There can be no question of the absolute soundness of the third of these propositions, and the

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second, correctly understood, is equally unquestionable; but the rule that an aggrieved party, before he may appeal, must await the entering of a final decree, was never intended to put limitations upon the power of a court of equity to give the relief most appropriate to the case before it. What it would be lawful for a court of chancery to do if there was no such rule as to appeals remains lawful, although such rule exists. The fact is that in this case the decree to be made would be final. The case has been brought regularly to hearing. Upon the record so made, the Government says it is entitled to a decree of dissolution. The court upon that record denies the relief for which the Government asks, which is a final determination of the issue, so far as it depends upon the record as it stands.

No one would question that a dismissal of the petition, albeit without prejudice, would be a final decree, from which an appeal would lie. Why should a mere retention of the petition make any difference? Dissolution is equally denied on the case as made. It is true that if, from something which has occurred since the filing of the petition, and which is subsequently brought to the attention of the court, a decree for dissolution becomes proper, it may then be made, precisely as the same result would follow if the petition had been dismissed without prejudice. The only difference is that in the latter case everybody would be put to far greater cost and trouble to reach the same end.

A decree will therefore be entered adjudging that while the defendant was organized to monopolize interstate trade in cans, and to attain that object such trade was unlawfully restrained by it and by those who formed it and directed its earlier activities, and that some of those individuals still participate in its management and control, still, upon all the facts and circumstances of the case, as those facts and circumstances are set forth and found in the opinion heretofore filed, the request or demand of the Government for a decree of dissolution is denied, without prejudice to a renewal of such demand or the seeking of other appropriate relief, if it shall hereafter be made to appear to the court from other facts occurring subsequent

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to the filing of the petition in this cause that the size and power of the defendant, brought about as they originally were, are being used to the injury of the public, or whenever such size and power, without being intentionally so used, have given to the defendant a dominance or control over the industry, or some portion of it, so great as to make dissolution or other restraining decree of the court expedient.

UNITED STATES *v.* RINTELEN ET AL.

(District Court, S. D. New York. June 29, 1916.)

[233 Fed. Rep., 793.]

MONOPOLIES 29—CONSPIRACIES—OFFENSES.—Under Sherman Act July 2, 1890, c. 647, § 1, 26 Stat. 209 (Comp. St. 1913, § 8820), declaring that every conspiracy in restraint of trade or commerce among the several States or with foreign nations is illegal, defendants, who conspired to restrain trade between the United States and foreign nations are guilty, though no overt acts were committed; such conspiracy being governed by the rules applicable to common-law conspiracy, which made the unlawful conspiring the gist of the offense.*

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 19; Dec. Dig. 29.

For other definitions, see Words and Phrases, First and Second Series, Conspiracy.]

CONSPIRACY 27—OFFENSES—OVERT ACT.—The common-law offense of conspiracy is completed when the unlawful conspiracy is completed, and proof of overt acts is unnecessary.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 38, 39; Dec. Dig. 27.]

INDICTMENT AND INFORMATION 1—PURPOSE OF INDICTMENT.—The object of an indictment is, first, to furnish accused with a description of the charge against him which will enable him to make his defense, and to avail himself of his conviction or acquittal for protection against a further prosecution for the same charge, as well as to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 1-3; Dec. Dig. 1.]

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MONOPOLIES 31—OFFENSE—CONSPIRACY—INDICTMENT—SUFFICIENCY.—An indictment charging that defendants, in violation of Sherman Act, § 1, making illegal every conspiracy in restraint of trade or commerce among the several States or with foreign nations, conspired to interfere with commerce between American manufacturers of war munitions, who were too numerous to be named, and the countries of Great Britain, France, Russia, and Italy, by organizing strikes, fomenting labor troubles, and by other means hindering the production of such munitions, as well as their transportation, is sufficient to charge an offense apprising the conspirators of the charge against them and of the means by which they intended to carry out their conspiracy.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 20; Dec. Dig. 31.]

CONSPIRACY 26—OFFENSES—DEFENSES.—A combination to effect an unlawful object through lawful means may constitute a criminal conspiracy.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. § 37; Dec. Dig. 26.]

[794] INDICTMENT AND INFORMATION 163—VALIDITY—BILL OF PARTICULARS.—A bill of particulars cannot aid an indictment which lacks a statement of the essential facts to constitute the offense charged, but is appropriate where there is a good indictment, and defendants desire to be more particularly informed as to matters which will aid them in their defense.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 525; Dec. Dig. 163.]

Franz Rintelen and others were indicted for a conspiracy in violation of the Sherman Act. On motion to quash by defendants Monnett and Taylor. Motion overruled.

John Lord O'Brian, of Buffalo, N. Y., and *Isaac R. Oeland*, of New York City, Sp. Asst. Attys. Gen., for the United States.

Pugh & Pugh, of Columbus, Ohio, for defendant Monnett.

WOLVERTON, District Judge.

The defendants are indicted for a conspiracy in violation of the first section of what is commonly known as the Sherman Act. It is declared by that section that every conspiracy in restraint of trade or commerce among the several States or with foreign nations is illegal. The sufficiency of the indictment is brought to test by a motion to quash on the

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part of the defendant Frank S. Monnett, in which Jacob C. Taylor joins. At the argument I was inclined to the opinion that the motion to quash was well taken, in view of the Cruikshank case and others holding to the same doctrine. Upon a careful examination of the authorities, however, I have arrived at the conclusion that the indictment is sufficient. I will proceed to state my reasons therefor.

[1, 2] This is not an indictment under section 37 of the Criminal Code (act March 4, 1909, c. 321, 35 Stat. 1096 [Comp. St. 1913, § 10201]), and it is not necessary that it set out that one or more of the parties have done any act to effect the object of the conspiracy. *Nash* v. *United States*, 229 U. S. 373, 378, 33 Sup. Ct. 780, 57 L. Ed. 1232. The sufficiency of the indictment is to be measured more nearly by the sufficiency of an indictment for the common-law offense of conspiracy. Under the common law the conspiring together is the offense, and on proof thereof a conviction is warranted. 8 Cyc. 624.

"An indictment may be sustained, wherever there is a conspiracy for an unlawful purpose, or to effect a lawful purpose, by unlawful means." *State* v. *Rowley*, 12 Conn., 101, 112.

As said in *Commonwealth* v. *Waterman*, 122 Mass, 43, 57:

"It is the combination of two or more to do something unlawful, either as a means or as an ultimate end, which constitutes the crime; and many acts not punishable by indictment have been held to come within this definition. It is said to be sufficient if the end proposed, or the means to be employed, are by reason of the power of the combination, particularly dangerous to the public interests, or particularly injurious to some individual, although not criminal."

I call attention to the fact that the statute is especially calculated to protect the public interests, while it may be true that it does protect private interests as well.

[795] [3, 4] The indictment in the present case is drawn with reference to the ultimate end to be effected by the conspiracy, namely, the restraint of trade or commerce between this and foreign nations, while it attempts, at least, to set out the means by which the object was to be attained. By way of inducement, so styled, it is alleged:

That a large number of individuals, copartnerships, and corporations called "manufacturers" were engaged in various States of

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the United States in the manufacture of munitions of war, military and naval stores, including rifles, cannon, and other weapons of war; also locomotives, cars, automobiles, aeroplanes, and the like, and railroad materials and other articles of many kinds, all of which were of a character adapted for use in war on land or at sea; that said articles were manufactured for the sole purpose of sale and shipment in trade and commerce with Great Britain, France, Russia, and Italy, and other foreign nations; that the manufacturers were engaged in the business of delivering and shipping said articles to persons, corporations, and organized bodies of men, from the State in which they were so manufactured, to and through the port of New York, and other ports of the United States, to foreign countries; that divers persons, corporations, and organized bodies of men other than said manufacturers were also engaged in so delivering, shipping, and transporting such articles from States of the United States to said foreign countries; that said manufacturers, etc., so engaged in foreign trade and commerce employed large numbers of men, both in the producing and in the manufacturing of said articles, and in selling, shipping, and transporting them in foreign trade and commerce, and said articles were continuously moved therein; that said articles, when it was necessary, were continuously moved from one State of the United States to other States; "that all of the names and localities of said manufacturers and said other parties so engaged in foreign trade and commerce as aforesaid, and the times, amounts, and routes of such shipments and transportations, are not known to the grand jurors aforesaid, and are so numerous as to preclude their enumeration in this indictment."

It is then further alleged:

"That Franz Rintelen, alias Fred Hansen, alias Miller, alias Muller, alias Edward V. Gasche, alias Edward V. Gates; David Lamar, alias Lanauer, alias David H. Lewis; Frank Buchanan, Jacob C. Taylor, H. Robert Fowler, Frank S. Monnett, Herman Schulteis, and Henry B. Martin, hereinafter called the 'defendants,' and divers other persons whose names are to the grand jurors unknown, each of whom well knew the facts as to said foreign commerce hereinbefore stated and alleged, at and within the said Southern district of New York and within the jurisdiction of this court, unlawfully did knowingly and willfully engage in a conspiracy to restrain the aforesaid foreign trade and commerce, and to restrain, hinder, and prevent the transportation of said articles in said foreign trade and commerce, so far as, and at such times, places, and as to such of said articles, and in such ways as they might thereafter be able so to do, and to restrain, prevent, and hinder the producing of manufacture of said articles for the sole purpose of restraining, preventing, and hindering the shipment and transporting in foreign trade and commerce of such of said articles and in such ways and

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at such times and places as they might be able so to do; that the purpose and object of said conspiracy was not confined to any particular articles, times, places, ways, and means, but the said defendants conspired and intended, at any time or place, and by any ways or means (some of which were not definitely determined upon by said defendants), to restrain, prevent, and hinder such shipments in foreign trade and commerce; and the particular articles, times, places, ways, and means determined upon by said defendants are not known to the grand jurors aforesaid."

The indictment then sets out the alleged means to be employed to effect the objects of the conspiracy. Now, here are set out the conditions existing with especial fullness, all leading up to the engaging [796] in foreign trade and commerce, a matter affecting the public in general, and then it is alleged that the purpose of the conspiracy was to restrain, prevent, and hinder such shipments in foreign trade and commerce.

It is laid down in *United States* v. *Cruikshank et al.*, 92 U. S. 542, 558, 23 L. Ed. 588, that:

"The object of the indictment is, first, to furnish the accused with such a description of the charge against him as will enable him to make his defense and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause; and, second, to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had. For this facts are to be stated, not conclusions of law alone. A crime is made up of acts and intent; and these must be set forth in the indictment, with reasonable particularity of time, place, and circumstances."

It is sufficient to say that this general rule has been many times reasserted and reaffirmed by the Supreme Court. The Cruikshank case was on an indictment based upon the alleged restraint of private rights, not public, and was preferred under a statute which provided for the punishment of such as conspired to "injure, oppress, threaten, or intimidate any citizen, with intent to prevent or hinder his free exercise and enjoyment of any right or privilege granted or secured to him by the Constitution or laws of the United States." The counts in the indictment to which the particular objections were directed charged, in substance, that the intent was to hinder and prevent the complaining citizens in the free exercise and enjoyment of "every, each, all, and singular" the rights granted them by the Constitution. "So

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here," the court said in passing upon the indictment, "the crime is made to consist in the unlawful combination with an intent to prevent the enjoyment of any right granted or secured by the Constitution, etc. All rights are not so granted or secured." The court held, therefore, that the indictment was not sufficiently specific, in that it failed to specify what particular right granted by the Constitution had been overridden by the alleged conspirators.

Not so here. The defendants are informed that many persons, corporations, etc., throughout the United States are engaged in the manufacture of the different articles and supplies mentioned, and with those articles were engaging in foreign trade and commerce, and that to hinder and restrain such trade and commerce was the particular purpose and object of the alleged conspiracy. Is this indictment sufficient?

The chief element in a common-law conspiracy is the meeting of the minds of two or more or several persons to effect or accomplish an unlawful purpose, or a lawful purpose through unlawful means, or, as suggested by Mr. Justice Holmes in *United States* v. *Kissel*, 218 U. S. 601, 31 Sup. Ct. 124, 54 L. Ed. 1168, under the Sherman Act, it is in essence nothing more than a partnership in criminal purposes. Or, as said in *Nash* v. *United States*, *supra:*

> "The Sherman Act punishes the conspiracies at which it is aimed on the common-law footing; that is to say, it does not make the doing of an act other than the act of conspiring a condition of liability."

[797] It was held in the case of *Williamson* v. *United States*, 207 U. S. 425, 28 Sup. Ct. 163, 52 L. Ed. 278, though the indictment was preferred under section 37 of the Criminal Code, wherein it was charged that the conspiracy was entered into for the purpose of committing the offense of subornation of perjury, that it was not essential that in the minds of the conspirators the precise persons to be suborned, or the time and place of such suborning should have been agreed upon, as the criminality of the conspiracy charged consisted in the unlawful agreement to accomplish the unlawful purpose.

So in an earlier case, *Dealy* v. *United States*, 152 U. S. 539, 543, 14 Sup. Ct. 680, 682 [38 L. Ed. 545], where the indict-

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ment charges a conspiracy to defraud the Government of large tracts of public lands, it was held not essential to set out by description the specific tracts of lands which it was sought to appropriate, the court saying:

"But manifestly the description in the indictment does not need to be any more definite and precise than the proof of the crime. In other words, if certain facts make out the crime, it is sufficient to charge those facts, and it is obviously unnecessary to state that which is not essential."

Summarized, it is the law on this subject that:

"Certainty to a common intent sufficient to identify the offense which the defendants conspired to commit is all that is required. When the allegation in the indictment advises the defendants fairly what act is charged as the crime which was agreed to be committed, the chief purpose of pleading is attained. Enough is then set forth to apprise the defendants so that they may make a defense." *United States* v. *Stevens* (D. C.) 44 Fed. 132, 141.

See also *Ching* v. *United States*, 118 Fed., 538, 540, 55 C. C. A., 304; *Thomas* v. *United States*, 156 Fed., 897, 907, 84 C. C. A., 477, 17 L. R. A. (N. S.), 720.

The purpose of the indictment in the present case is not to charge the commission of an offense against the United States, as might be done under section 37, but to charge a conspiracy in violation of the first section of the Sherman Act, namely, a conspiracy in restraint of trade and commerce with foreign nations; the very gist of the offense being the conspiracy. When the conspiracy is once entered into, as under the common law, the offense is complete. The conspiracy does not go to the restraint in trade of any particular individual or corporation, or combination of men, but to the restraint of all foreign trade where munitions of war are the subject of commerce. So what more could be essential, when the defendants are informed that many persons, corporations, and combinations of men are engaged in the manufacture of such articles constituting munitions of war, and are also engaged in transporting the same in foreign trade and commerce, the alleged purpose and object of the conspiracy being in restraint of such trade and commerce? Can it be said that the defendants are not informed of the nature and cause of the accusation?

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Even in the Cruikshank case, we must assume that the indictment would have been sufficient if it had specified the particular right that had been infringed. Here there is ample description of the foreign trade and commerce being restrained, namely, that consisting of the transportation of munitions of war, manufactured by divers and [798] sundry manufacturers in the United States especially for exportation to foreign countries. There are no other particulars pertinent to descend to. It is surely not designed that the name of every manufacturer even known to the grand jury, that the articles produced by such manufacturers, that the railways and ships and all routes of transportation, including the names of all the consignees, shall be set forth in the indictment, or even that any of these things be particularized, for the defendants are informed of the nature of the offense without that. "The true test is," says the court in *Cochran and Sayre* v. *United States*, 157 U. S. 286, 290, 15 Sup. Ct. 628, 630 [39 L. Ed. 704], "not whether it [the indictment] might possibly have been made more certain, but whether it contains every element of the offense intended to be charged, and sufficiently apprises the defendant of what he must be prepared to meet, and, in case any other proceedings are taken against him for a similar offense, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction." Without extending the discussion further, I cite the cases of *United States* v. *Patten*, 226 U. S. 525, 33 Sup. Ct. 141, 57 L. Ed. 333, 44 L. R. A. (N. S.) 325, and *Nash* v. *United States*, *supra*, in support of the present indictment. The indictments there seem to have been drafted upon the same theory as the one in question, and have been sustained by the Supreme Court.

Now, beyond what has been here said, the indictment specifies the means, or some of them, by which the objects of the conspiracy were intended to be accomplished, namely, by instigating and causing strikes and walkouts among the workmen employed at the plants and factories of the aforesaid manufacturers, so as to prevent and hinder the aforesaid manufacture; by instigating and causing strikes and

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walkouts among workmen and employés of said persons, partnerships, corporations, and organized bodies of men other than said manufacturers, engaged in foreign trade and commerce as aforesaid, employed in the shipping and transporting of said articles; by inducing by solicitation, persuasion, and exhortation, through the preparation, sending, mailing, and distributing of circulars, pamphlets, etc., the aforesaid workmen to quit the employment of the aforesaid manufacturers, and thereby to restrain, hinder, and prevent, in whole or in part, the operation of said plants; by the same method to cause the aforesaid workmen to leave the employ of the aforesaid persons, partnerships, etc., other than said manufacturers, engaged in said foreign trade and commerce as aforesaid, for the purpose of restraining, hindering, and preventing, in whole or in part, the shipping and transportation of said articles in the aforesaid foreign trade and commerce; by bribing and distributing money among divers officers and persons in charge and control of various labor organizations, to induce them to cause the members of said organizations who might be employed by said manufacturers, or by the said other persons, etc., engaged in foreign trade and commerce as aforesaid, to leave their employment, and to bring about strikes and walkouts among the members of said organizations, and thereby to restrain, prevent, and hinder, in whole or in part, the producing and manufacture, and the expected shipping and trans[799]portation in said foreign trade and commerce, of said articles; and by divers other means and methods not specifically determined upon by said defendants, but to be decided upon by them as occasion might arise, all calculated in furtherance of and to effect the object of said conspiracy. With these supporting the paper, my convictions are that it is sufficient.

[5] It is suggested that some of the alleged means employed or to be employed are sanctioned as lawful by the Clayton Act. But this does not help the defendants, as a combination to effect an unlawful object through lawful means may constitute a conspiracy, nevertheless.

[6] I am aware that a bill of particulars can not aid an indictment which lacks the statement of essential facts to

constitute the offense sought to be charged. Such a bill is, however, appropriate where there is a good indictment, and if the defendants desire to be more particularly informed as to matters that will aid them in their defense, it is their privilege to make application to the court for such relief. But this aside, I think the defendants' rights for defense are adequately subserved by the indictment.

Some criticism is made that the indictment contains certain inconsistencies. I have examined the criticism in this respect, and am not impressed that it is well founded.

The motion to quash will be overruled.

SKAGGS ET AL. v. KANSAS CITY TERMINAL RY. CO. ET AL.

(District Court, W. D. Missouri, W. D. May 12, 1916.)

[233 Fed. Rep., 827.]

COURTS 361—RULES OF DECISION—STATE LAWS.—Congress having undertaken by the Anti-Trust Acts (Act Feb. 4, 1887, c. 104, § 3, 24 Stat. 380 [Comp. St. 1913, § 8565]; Act July 2, 1890, c. 647, 26 Stat. 209; Act Oct. 15, 1914, c. 323, 38 Stat. 730), to deal with monopolies affecting interstate commerce, and having conferred jurisdiction of questions arising thereunder on the Federal courts, in determining such questions those courts exercise an independent judgment, unaffected by the decisions of the courts of the State.[a]

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 954; Dec. Dig. 361.]

CARRIERS 14—REGULATIONS AT STATIONS—HACKMEN AND BAGGAGE CARRIERS.—Under the rule of the Federal courts, a railroad and depot company may lawfully exclude some hackmen or carriers of baggage from entering its grounds or station for the purpose of soliciting patronage and plying their vocation, while it gives to others the exclusive privilege of doing so.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 29; Dec. Dig. 14.]

COURTS 366(1)—FEDERAL COURTS—AUTHORITY OF STATE DECISIONS.—It is only the highest court of a State whose decisions construing the State constitution or statutes are binding on the Federal courts.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 956, 957, 967; Dec. Dig. 366(1).]

Opinion of the Court.

In Equity. Suit by Joseph Skaggs and others against the Kansas City Terminal Railway Company, the Shaw Transfer Company, and others. On defendants' motion to dissolve injunction, and for temporary injunction on cross bill. Motions granted.

Russell Garnett, of Kansas City, Mo., for plaintiffs.

Samuel W. Sawyer and *R. J. Ingraham*, both of Kansas City, Mo. (*Lathrop*, *Morrow*, *Fox & Moore*, of Kansas City, Mo., of counsel), for defendants.

Van Valkenburgh, District Judge.

The plaintiff, Joseph Skaggs, for himself and such other persons as are jointly interested and may join in seeking the same relief, filed this bill in the circuit [828] court of Jackson County, Mo., against the Kansas City Terminal Railway Company, the Shaw Transfer Company, both Missouri corporations, and Hiram W. Hammil, chief of police of Kansas City, Mo., to restrain the defendants from depriving the plaintiff or plaintiffs of the use of the Union Station Plaza, adjacent to said Union Station, by forcing them to remove their hacks therefrom while waiting for passengers, and from interfering with plaintiffs in any way while thereon; also praying that plaintiffs be allowed free access to and use of said premises in the employment of their business as hack drivers and collectors of passengers. A temporary restraining order was granted, and plaintiffs dismissed as to defendant Hammil. Thereafter an amended bill was filed, charging that the defendants Terminal Company and Transfer Company had entered into an unlawful conspiracy and agreement for the purpose of fixing prices and monopolizing and controlling the transfer and baggage business to and from the new Union Station in Kansas City, Mo., as evidenced by a certain contract set out in full, whereby the Terminal Company granted the Transfer Company the exclusive privilege of soliciting patronage for its cabs, carriages, and baggage service upon the grounds and premises of the Terminal Company at said Union Station. In said contract the carriage provided for was between said Union Station and any

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part of Kansas City, Mo., or Kansas City, Kan. Upon the filing of the amended bill, containing allegations of an unlawful contract, conspiracy, and agreement in restraint of trade, and for the creation of a monopoly affecting commerce, both interstate and intrastate, the defendant Terminal Company seasonably filed its petition and bond for removal. The case was transferred to this court, the restraining order being retained in force. In this court the defendant Terminal Company has filed answer and cross bill, praying affirmative relief by injunction on its behalf. The plaintiffs filed a motion to remand, but later joined in the hearing upon this motion, and thereafter filed reply to defendant Terminal Company's answer, and an answer to said defendant's cross bill.

[1] The primary question, of course, is as to the jurisdiction of this court. Plaintiffs at the hearing practically abandoned the motion to remand and no question of jurisdiction is urged in the briefs of counsel. Pleadings have been filed amounting to an acceptance of this forum, but, inasmuch as diversity of citizenship is not present, such implied consent would be inoperative unless jurisdiction is otherwise affirmatively disclosed. However, the allegations of the petition clearly and sufficiently bring the case within the acts of Congress. Act Feb. 4, 1887, c. 104, § 3, 24 Stat. 380 (Comp. St. 1913, § 8565); act July 2, 1890, c. 647, 26 Stat. 209; act Oct. 15, 1914, c. 323, 38 Stat. 730. Congress has, therefore, entered and appropriated this field.

[2] Under such conditions, the rule in Federal jurisdictions is controlling; and that rule is the later and better reasoned doctrine and is supported by the undoubted weight of authority. A railroad and depot company may lawfully exclude some hackmen or carriers of baggage from entering its grounds or station for the purpose of soliciting patronage and plying their vocation, while it gives to others the exclusive privilege of doing so. *Donovan* v. *Pennsylvania Company*, 199 U. S. [829] 279, 26 Sup. Ct. 91, 50 L. Ed. 192; *Depot Carriage & Baggage Co.* v. *Kansas City Terminal Ry. Co.* (C. C.) 190 Fed. 212; *Oregon Short Line R. R. Co.* v. *F. T. Davidson et al.*, 33 Utah, 370, 94 Pac. 10, 16 L. R. A. (N. S.) 777, and note, 14 Ann. Cas. 489. The latter case is

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selected for citation because of its exhaustive and convincing reasoning, and of the complete presentation of doctrine and authorities in the attendant footnote.

Plaintiffs rely upon the contention that the contrary doctrine prevails in this State, and that this case should be governed by the law of the jurisdiction in which the station is situated. The decision in *Donovan* v. *Pennsylvania Co.*, *supra*, seems, on first impression, to be conditioned upon the absence of valid State legislation to the contrary; but such is really not the case as applied to the doctrine generally. In that case, so far as appears from the record, the Federal jurisdiction was founded solely upon diversity of citizenship, and so the existence or non-existence of local prohibitions became pertinent and was discussed; but such considerations lose their force in a case in which Congress, by entering the field, has drawn to the courts of the United States paramount jurisdiction and authority. The subject is then one of general law, in respect of which the courts of the United States are entitled to exercise their independent judgment in light of the settled principles that must always control the determination of the legal rights of parties. *Donovan* v. *Pennsylvania Co.*, *supra*, 199 U. S. loc. cit. 200, 26 Sup. Ct. 91, 50 L. Ed. 192. The rule announced by the Supreme Court of the United States must be determinative of the present controversy.

But, even though it were to be conceded that the local law controls, nevertheless, after careful examination, I am of opinion that the decisions of the highest courts of this State do not sustain plaintiffs' position. Reliance is placed upon section 23 of article 12 of the Missouri constitution, to-wit:

"*Discrimination Between Companies and Individuals.*—No discrimination in charges or facilities in transportation shall be made between transportation companies and individuals, or in favor of either, by abatement, drawback, or otherwise; and no railroad company, or any lessee, manager, or employé thereof shall make any preference in furnishing cars or motive power."

And upon sections 3174 and 3184, R. S. Mo. 1909, which read as follows:

"Sec. 3174. *Railways Declared Public Highways, and Companies Common Carriers — Discrimination Prohibited — Penalty.*—Railways

heretofore constructed, or that may hereafter be constructed in this State, are hereby declared public highways, and railroad companies common carriers. No railway company, corporation, or association shall hereafter make any discrimination in charges or facilities in the transportation of freight or passengers between transportation companies and individuals, nor in the transportation of freight between commission merchants or other persons engaged in the transportation of freight and individuals, in favor of either, by abatement, drawback, or otherwise, nor shall any such company, corporation, or association, nor any lessee, manager, or employé of any such company, corporation, or association make any preference between the parties aforesaid in furnishing cars or motive power, for the purpose aforesaid. Any company, corporation, or association, or manager, lessee, or employé, violating the provisions of this section shall forfeit and pay to the party injured the whole amount of [830] such transportation charged, to be recovered before any court of competent jurisdiction: Provided, that excursion or commutation tickets may be issued at special rates. (R. S. 1899, § 1127.)"

"Sec. 3184. *Discrimination Between Persons or Localities Prohibited.*—It shall be unlawful for any such common carrier to make or give any undue or unreasonable preference or advantage to any particular person, company, or firm, corporation, or locality, in the transportation of goods, wares, and merchandise of any character, or to subject any particular person, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage with respect to such transportation; and all such common carriers shall afford equal facilities for the interchange of traffic between their respective lines, and for receiving, forwarding, and switching cars and delivering property to and from their lines, and to and from other lines and places connected therewith, and shall not discriminate in their accommodation, rates, or charges between such connecting lines and places. But this provision shall not be construed as requiring such common carriers to give the use of their tracks or terminal facilities to other common carriers engaged in a similar business. (R. S. 1899, § 1133.)"

Counsel cite the following Missouri cases in support of their contention: *Cravens* v. *Rodgers*, 101 Mo. 247, 14 S. W. 106; *Christie* v. *Missouri Pac. Ry. Co.*, 94 Mo. 453, 7 S. W. 567; *Home Telephone Co.* v. *Neosho Telephone Co.*, 147 Mo. App. loc. cit. 237, 126 S. W. 773; *Tie Company* v. *Stone*, 135 Mo. App. 438, 117 S. W. 604.

It seems obvious that the sections of constitution and statutes quoted apply only to those doing business with carriers in connection with railroad transportation; that is to say, patrons or would-be patrons who sustain a contractual

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relation with them. Hack drivers generally stand in no such a relation to the defendant Terminal Company. It is true that in *Cravens* v. *Rodgers*, 101 Mo. 247, 14 S. W. 106, the Supreme Court of Missouri, in a case between two transfer lines to which the railroad company was not a party, held, in effect, that such an exclusive privilege cannot be given, as against public policy and the spirit of the State constitution (article 12, section 23, supra); but the Supreme Court of Missouri did not undertake in that case to construe this article of the constitution. It is said that such an agreement was against its spirit, not its terms; and it based its ruling upon its conception of public policy and general law. In such cases, as we have seen, local decisions are not controlling. *Donovan* v. *Pennsylvania Co.*, *supra*. It should further be remarked that sections 3174 and 3184 were upon the statute book when *Cravens* v. *Rodgers* was decided, and no mention is made of these sections as affecting the subject now under discussion.

[3] I do not find that these sections have been held applicable to a state of facts such as is here presented. But if decisions of the State Courts of Appeals are so viewed, we are reminded that, while entitled to respectful consideration, they are not the decisions of the highest judicial tribunal of the State, which alone are binding on the Federal courts in their construction of local statutes. *Federal Lead Company* v. *Sawyers*, 161 Fed. 687, 88 C. C. A. 547.

However, it may be profitable to make brief examination of such cases cited. In *Tie Company* v. *Stone*, 135 Mo. App. 438, 117 S. W. 604, the court limits its ruling to railroad transportation affecting patrons of the carrier in this respect, which is an agreement with the [831] views herein expressed. In *Telephone Company* v. *Telephone Company*, 147 Mo. App. 216, 126 S. W. 773, the majority opinion, while indirectly supporting the general contention of plaintiffs, does not attempt to construe the sections of statute under discussion. The dissenting opinion, however, is in full accord with the doctrine announced by this court. In *Home Telephone Company* v. *Sarcoxie Telephone Co.*, 236 Mo. 114, 139 S. W. 108, 36 L. R. A. (N. S.) 124, the Supreme

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Court reverses the ruling of the Court of Appeals just referred to, and expressly declares the dissenting opinion of Judge Reynolds to be the law of the case. Judge Graves refers to section 3106 of the railroad act (R. S. Mo. 1909), which reads—

"All railroad corporations may contract with each other, or with other corporations, in any manner not inconsistent with the scope, object, and purpose of their creation and management"—

and cities with approval *Wiggins Ferry Co.* v. *Railroad Company*, 73 Mo. 389, 39 Am. Rep. 519; Id., 128 Mo. 224, 27 S. W. 568, 30 S. W. 430, in which it was held to be proper for a railway company to enter into a contract with a single ferry company to handle its trade, and, further, that such contract is not viewed as violative of public policy, nor as being a contract in restraint of trade or creating a monopoly. These rulings supersede the Missouri cases cited by counsel for plaintiffs, in so far as the same may seem to be in conflict with the doctrine here announced. In any aspect, therefore, the matter is thus left for the independent judgment of this court, which must be governed by considerations of general law and by the pronouncements of Federal courts of last resort.

It should be added that by stipulation, as well as by the proofs, the property of the Terminal Company is to be deemed in every legal sense private property as between it and those of the general public who have no occasion to use it for purposes of transportation. The right of the company to the exclusive use and enjoyment thereof is as perfect and absolute as that of an owner of real property not burdened with public or private easements or servitudes. Furthermore, the rights of the public are not impaired by the grant by a railroad company of the exclusive privilege to solicit patronage for hacks and baggage transferring within its depot grounds, where the recipient of the privilege and the facilities furnished are subject to legislative regulation. *Oregon Short Line R. R. Co.* v. *Davidson et al.*, 33 Utah, 370, 94 Pac. 10, 16 L. R. A. (N. S.) 777, 14 Ann. Cas. 489. It is conceded in the present case that the transfer companies' rates and fares are subject to such regulation.

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It appears convincingly that the limitation of the station transfer privileges to a single responsible party is in no sense unreasonable. While the matter of revenue is concededly involved, nevertheless the station company is no doubt actuated by experience thus to eliminate, to great extent, the possibility of abuses which are known to have been present in the past at the old station. Adequate provision is made in the contract for all the needs of the traveling public in this regard. Manifestly, out-going passengers are in no wise affected, because plaintiffs and others have the conceded right to enter upon the premises of [832] the Terminal Company for the purpose of actual delivery of passengers and baggage. They also have the right to receive passengers and baggage for whose transportation they shall have already received orders. The freedom of all parties to take their stands upon appropriate public places outside the limits of the premises of defendant Terminal Company affords to the public generally, including all in-coming passengers, every opportunity to avail itself of their services, should it so desire. The new Union Station has been built with a view to affording every convenience and comfort to travelers. The interests of the public demand that the Terminal Company should be given every opportunity to keep its approaches cleanly and attractive. The presence of horses in considerable numbers near its principal entrance, and in close proximity to the very high class restaurant maintained, detracts much from the comfort of patrons. No doubt the plaintiffs and those similarly situated make effort to render their stands as unobjectionable as possible, but common experience teaches that such efforts can not be wholly successful. However, this case is decided upon the property rights involved independently of such considerations.

It follows that the restraining order heretofore granted against defendants should be dissolved, and the temporary injunction, restraining plaintiffs, and every other person or corporation similarly situated who has become party or privy to this proceeding, their agents, servants, and employé under their authority and control, from standing their horses, teams, and vehicles of every kind or description

upon the Union Station Plaza, and from soliciting the custom and patronage of passengers or other persons upon the Union Station Plaza, or premises of defendant and cross-complainant Terminal Company, should be granted. An order may be prepared in conformity with the views herein expressed.

SOUTHERN PHOTO MATERIAL CO v. EASTMAN KODAK CO. OF NEW YORK.

(District Court, N. D. Georgia. July 20, 1916.)

[234 Fed. Rep., 955.]

MONOPOLIES 28—ACTIONS—SERVICE—SUFFICIENCY.—The Sherman Anti-Trust Act, July 2, 1890, c. 647, § 7, 26 Stat. 210 (Comp. St. 1913, § 8829), authorizes action in any district court in a district in which the defendant resides or is found. The Clayton Act, Oct. 15, 1914, c. 323, § 12, 38 Stat. 736, authorizes suits not only in the judicial district whereof defendant is an inhabitant, but also in any district wherein it may be found or transacts business. The defendant, a New York corporation, had its principal place of business and domicile in New York, but it also carried on business in Georgia, though it had no agent in such State on whom process could be served. *Held,* that under the statute defendant might be sued in the district court for Georgia, service being had on defendant at its domicile.*

[Ed. Note.—for other cases, see Monopolies, Cent. Dig. § 18; Dec. Dig. 28.]

At Law. Action by the Southern Photo Material Company against the Eastman Kodak Company of New York. On plea to jurisdiction [956] and traverse of service. Plea and traverse overruled, and motion to quash denied.

See, also, 224 Fed. 523.

King & Spalding, of Atlanta, Ga., for plaintiff.

Smith, Hammond & Smith, of Atlanta, Ga., for defendant.

NEWMAN, District Judge.

This is a suit brought by the plaintiff against the defendant under the Sherman Anti-Trust Act of July 2, 1890, 26

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Stat. 209, 210, and the Clayton Act of October 15, 1914, 38 Stat. 730. The questions now considered are the jurisdiction of the court and the sufficiency of the service.

The Southern Photo Material Company is a Georgia corporation, having its residence in the city of Atlanta, in the Northern District of Georgia. The Eastman Kodak Company is a corporation of the State of New York and a citizen and resident of that State, having its principal office in the city of Rochester.

There is a Georgia corporation in the city of Atlanta, known as the Glenn Photo Stock Company, the stock in which is owned by the Eastman Kodak Company of New Jersey, which is the same company that owns the stock of the Eastman Kodak Company of New York, the defendant here.

The first service in this case was perfected by serving W. Frank Luckiesh, manager of the Glenn Photo Stock Company. This service was traversed by the defendant, appearing for the purpose of objecting to the service.

Subsequent to this an order was made by the court authorizing service on the defendant by service at its principal office or place of business in the city of Rochester, N. Y., a copy of the petition and the amendment to the petition, and the process in the case, together with a copy of the order of the court providing for this service, to be sent to the United States marshal for the Western District of New York to be served by him on the defendant company.

The United States marshal for the Western District of New York has made return by his deputy of service of the petition, amendment to petition, and order of court allowing the same, process and order of service, on George Eastman, treasurer of the Eastman Kodak Company of New York. After this the defendant renewed his plea to the jurisdiction and traverse as to this last service.

The Sherman Anti-Trust Act of 1890, provided that a defendant might be sued in any Circuit Court of the United States (now District Court) "in the district in which the defendant resides or is found." In the Clayton Act of 1914, it is provided that a defendant may be sued "not only in the judicial district whereof it is an inhabitant, but also in any

district wherein it may be found or transacts business." The question discussed here is, whether suit may be brought in a district where the defendant "transacts business," although not "found" in that district within the meaning of the decisions defining that term.

In this case the evidence shows that there are 126 regular customers of the defendant company in the State of Georgia, and that it has certain demonstrators who travel in Georgia and adjoining States for [957] the purpose of demonstrating articles manufactured by the Eastman Kodak Company of New York, of furthering its interests as its representatives and, to some extent, taking orders for goods, and the question made is whether, transacting business in this State, which it undoubtedly does to the extent indicated, but where it has no representative in the district upon whom service can be made, the court has jurisdiction. In other words, whether the service at its home office is good because it "transacts business" here and not because it is "found" here. Counsel claim that the expression "found" and that of "transacting business" are synonymous; that is, that the business transacted must be of such character and the company sued must have such representatives in the district that, under the decisions on the subject, it is "found" in the district. The claim as to the necessity for it being "found" in this district and how it must be found are based upon the cases of *Goldey* v. *Morning News*, 156 U. S. 518, 15 Sup. Ct. 559, 39 L. Ed. 517, and particularly *Green* v. *Chicago, Burlington & Quincy Railway Co.*, 205 U. S. 530, 27 Sup. Ct. 595, 51 L. Ed. 916, and a decision made in this district, *West* v. *Cincinnati, N. O. & T. P. Ry. Co.* (C. C.) 170 Fed. 349. Two recent cases are cited as pertinent to the question under discussion. *International Harvester Co.* v. *Kentucky*, 234 U. S. 579, 34 Sup. Ct. 944, 58 L. Ed. 1479, is cited for the plaintiff, and *Thornburn* v. *Gates* (D. C.) 225 Fed. 613, for the defendant.

The conclusion to which I have come is thus: That under section 12 of the Clayton Act suits may be brought in any judicial district whereof the corporation is an inhabitant, and also any district wherein it may be found, and in addi-

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tion in any district wherein it transacts business. The process, of course, must be served in the district of which it is an inhabitant or wherein it may be found. The purpose of the act was, I think, to give the courts jurisdiction in any district in the United States where a corporation transacts business, whether in the sense of the decisions it is 'found" there or not, and then that service on it may be perfected at its home office in the district whereof it is an inhabitant or wherein it may be found; that is, "found" as provided in the decisions construing that term.

In this case, as I have stated, the evidence shows clearly that the defendant company is transacting business in Georgia, and in this district, and therefore the court here has jurisdiction of the case. The defendant has been served by serving it at its home office in New York, in pursuance of the court's order, and that the service is sufficient under the statute. I think the service of process on Mr. Luckiesh, the manager of the Glenn Photo Stock Company, of Atlanta, was not good and must be disregarded in determining the question of due service in the case.

The result is that the plea to the jurisdiction must be overruled as well as the traverse of service, and the motion to quash the service.

D. R. WILDER MANUFACTURING COMPANY *v.* CORN PRODUCTS REFINING COMPANY.

ERROR TO THE COURT OF APPEALS OF THE STATE OF GEORGIA.

No. 71. Argued November 9, 1914.—Decided February 23, 1915.

[236 U. S., 165.]

Where the pleading of the plaintiff in error demurred to justified the inference that the transaction alleged to be in violation of the Anti-Trust Act was interstate, the court may assume that such was the case, and, if the decision turns on the construction of the act, a Federal question is involved.[a]

The general rule is that one who has dealt with a corporation as an existing concern having capacity to sell, can not assert, or escape

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liability, on the ground that such concern has no legal existence because it is an unlawful combination in violation of the Anti-Trust Act. Such a defense is a mere collateral attack on the organization of the corporation which cannot lawfully be made. *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540.

Courts may not refuse to enforce an otherwise legal contract because it might afford some indirect benefit to a wrongdoer.

The contract in this case *held* not to be intrinsically illegal because the seller agreed to give a portion of its profits to the purchaser of goods provided the latter dealt exclusively with the former for a specified period and that the purchaser bought the goods exclusively for its own use; and also *held* that such contract was not illegal under the Anti-Trust Act. *Continental Wall Paper Co.* v. *Voight*, 212 U. S. 227, distinguished.

The Anti-Trust Act is founded on broad conceptions of public policy and its prohibitions were enacted not only to prevent injury to the individual but harm to the general public, and its prohibitions and the remedies it provides are co-extensive with such conceptions.

Where a statute creates a new offense and denounces the penalty, or gives a new right and declares the remedy, the punishment or remedy given can be only that which the statute prescribes.

The power given by the Anti-Trust Act to the Attorney General to dissolve a corporation or combination as violative of that act is inconsistent with the right of an individual to assert as a defense to a [166]contract on which he is otherwise legally liable that the other party has no legal existence in contemplation of that act.

In *Continental Wall Paper Co.* v. *Voight*, 212 U. S., 227, the contract involved was not held illegal because a party thereto was an illegal combination under the Anti-Trust Act, but upon elements of illegality inhering in the contract itself. In this case, *held* that a party can not assert as a defense to a suit for money otherwise due under a contract, not inherently illegal, the fact that the party otherwise admittedly entitled to recover is an illegal combination under the Anti-Trust Act.

11 Ga. App. 588, affirmed.

[59 L. Ed. 520.[a]]

[CORPORATIONS—ORGANIZATION—COLLATERAL ATTACK.—1. The legal existence of a corporate seller of goods cannot be collaterally attacked by raising the objection in a suit for the purchase price that the corporation was organized in violation of the act of July 2, 1890 (26

[a] The paragraphs following, in brackets, comprise the syllabus of the case as reported in volume 59, page 520, Lawyers Edition, Supreme Court Reports. Syllabus copyrighted, 1914, 1915, by The Lawyers Co-operative Publishing Company.

Argument for Plaintiff.

Stat. at L. 209, chap, 647, Comp. Stat. 1913 § 8820), forbidding combinations in restraint of interstate commerce.

For other cases, see Corporations, I. c. 1, in Digest Sup. Ct. 1908.

MONOPOLY—RIGHT TO RECOVER ON CONTRACT OF SALE.—2. The illegality of a corporation organized in violation of the Sherman Anti-Trust Act of July 2, 1890 (26 Stat. at L. 209, chap. 647, Comp. Stat. 1913, § 8820), does not preclude such corporation from recovering the purchase price of goods sold and delivered by it.

For other cases, see Monopoly, II. a, in Digest Sup. Ct. 1908.

MONOPOLY—RIGHT TO RECOVER ON CONTRACT OF SALE.—3. Recovery of the purchase price for goods sold and delivered by a corporation organized in violation of the Sherman Anti-Trust Act of July 2, 1890 (26 Stat. at L. 209, chap. 647, Comp. Stat. 1913, § 8820), may not be denied because the goods were sold upon condition which made the payment to the purchaser of his percentage under a proposed profit-sharing scheme devised by the corporation depend upon the exclusive dealing of the purchaser with the corporation during the following year, or because, under the contract of sale, the goods could not be resold.

For other cases, see Monopoly, II. a, in Digest Sup. Ct. 1908.

CONTRACTS—OFFER AND ACCEPTANCE—PERFORMANCE OF CONDITION.—4. The purchaser of goods from a corporation organized in violation of the Sherman Anti-Trust Act of July 2, 1890 (26 Stat. at L. 209, chap. 647, Comp. Stat. 1913, § 8820), is not entitled to his percentage in a proposed profit-sharing scheme devised by the corporation, where he did not comply with the condition upon which the offer of a right to a participation in the profits was rested, or the contract (if there was a contract to that effect) was based, *viz.*, that he would for the following year deal exclusively with such corporation.]

For other cases, see Contracts, I. d, 4; V. d, in Digest Sup. Ct. 1908.]

The facts, which involve the construction of the Federal Anti-Trust Act, and the effect of a profit-sharing contract of a corporation and those dealing with it exclusively and the right of the corporation to recover for goods sold, are stated in the opinion.

Mr. Marion Smith for plaintiff in error:

The answer shows defendant in error to be a combination in restraint of interstate trade in violation of the Federal statute; the combination merged into one corporation various firms and corporations which previously had been competitors, for the purpose, and with the effect, of restraining and monopolizing such interstate trade. The creation

of a monopoly is sufficient to make the restraint unreasonable. *Am. Tobacco Co.* v. *United States*, 221 U. S. 106; *Standard Oil Co.* v. *United States*, 221 U. S. 1.

The corporate organization of the defendant in error cannot be used as a cloak to cover the fact that it constitutes an illegal combination. *Northern Securities Co.* v. *United States*, 193 U. S. 197; *Am. Tobacco Co.* v. *United States*, and *Standard Oil Co.* v. *United States*, *supra*.

A recovery cannot be had upon an account for goods sold and delivered by such illegal combination when the goods were sold with direct reference to and in execution of agreements which had for their object and which had directly as their effect the accomplishment of the illegal [167] ends for which the combination was organized. *Continental Wall Paper Co.* v. *Voight*, 212 U. S. 227.

It is not necessary to show that the contracts under which the goods were sold are expressly violative of the Federal statute. The illegal intent with which the contracts were made is sufficient to make illegal contracts which appear on their face as no more than ordinary acts of competition. *Nash* v. *United States*, 229 U. S. 373; *Swift* v. *United States*, 196 U. S. 375; *Loewe* v. *Lawlor*, 208 U. S. 274.

A contract of purchase by an illegal combination which together with other similar contracts tends to create a monopoly is void and unenforceable even though the other party to the contract is ignorant of its purpose in this respect. *Brent* v. *Gay*, 149 Kentucky, 615.

A contract, which though apparently harmless in itself, is in reality a part of a general scheme to violate statutes against the restraint of trade, will be held to be illegal. *Continental Wall Paper Co.* v. *Voight*, *supra; Cravens* v. *Carter*, 92 Fed. Rep. 479; *Pacific Factor Co.* v. *Adler*, 90 California 110; *Fink* v. *Schneider Granite Co.*, 187 Missouri 244; *Detroit Salt Co.* v. *National Salt Co.*, 134 Michigan 120.

A contract is illegal where, though harmless on its face, it is one of many similar contracts which collectively have the direct effect of aiding an illegal purpose of restraining

interstate trade. *United Shoe Machinery Co.* v. *LaChapelle*, 212 Massachusetts 467.

The scheme must be treated as an entirety. *Addyston Pipe Co.* v. *United States*, 175 U. S. 211; *Swift* v. *United States*, 196 U. S. 375; *Montague* v. *Lowry*, 193 U. S. 38; *Loewe* v. *Lawlor*, 208 U. S. 274.

Illegality may consist in the purpose to accomplish an illegal result though the methods used are not inherently unlawful. *Hanauer* v. *Doane*, 12 Wall. 342; *Kohn* v. *Melcher*, 43 Fed. Rep. 641; *Mogul Steamship Co.* v. *Mc-*
[168] *Gregor*, L. R. 61; Q. B. Div. 285; [1892] A. C. 25; Clark on Contracts, 478 *et seq.*

Whenever the illegality appears, whether the evidence comes from one side or the other, the disclosure is fatal to the case. No consent of the defendant can neutralize its effect. *Hall* v. *Coppell*, 7 Wall. 542; *Armstrong* v. *Toler*, 11 Wheat. 258; *Embrey* v. *Jemison*, 131 U. S. 336.

One of the parties cannot maintain an action on the valid part of the contract, discarding or omitting to prove the portion that is illegal. *McMullin* v. *Hoffman*, 174 U. S. 639.

Under the Continental Wall Paper Co. case, when the sales are made under and with reference to an illegal agreement, and the plaintiff sues on the sales, the defendant may thereupon plead the illegal agreement of which the sales are a part. See also *Oscanyan* v. *Winchester Arms Co.*, 103 U. S. 261.

The cases relied upon by the defendant in error can be distinguished from the case at bar. *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, which is especially stressed by the defendant in error, decided only that an illegal combination was not by reason alone of its illegal character prevented from collecting for goods sold.

If any of the cases urged by the defendant in error go to the extent of holding that this is not sufficient to make the agreement illegal, they are in conflict with the decisions of this court. *Nash* v. *United States*, 229 U. S. 373; *Swift* v. *United States*, 196 U. S. 375; *Loewe* v. *Lawlor*, 208 U. S. 274. *Bank* v. *Glass*, 169 Mo. App. 374, is not in point, nor is *Bessire* v. *Corn Products Co.*, 47 Ind. App. 313.

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There is nothing to distinguish this case from the Continental Wall Paper Co. case, and the decision then rendered is controlling.

Mr. James W. Austin and *Mr. Preston Davie*, with whom *Mr. Morgan J. O'Brien*, *Mr. Albert B. Boardman*, [169] and *Mr. Young B. Smith* were on the brief, for defendant in error.

Mr. Chief Justice WHITE delivered the opinion of the court.

We refer to the parties, the one as the Manufacturing, and the other as the Refining Company. Sued by the Refining Company in April, 1909, to recover the amount of the price of two lots of glucose or corn syrup which it had bought in January, 1909, and which it had consumed and not paid for, the Manufacturing Company asserted its nonliability on the following grounds which we summarize:

(*a*) Because the Refining Company had no legal existence as it was a combination composed of all the manufacturers of glucose or corn syrup in the United States, illegally organized with the object of monopolizing all dealings in such products in violation of the Anti-Trust Act of Congress. That having illegally brought into one organization all the manufacturers of glucose or corn syrup, the corporation had unreasonably advanced the price of the products of its manufacture to the injury of the public. (*b*) That this end being accomplished, the corporation sought to perpetuate its monopoly by rendering it difficult or impossible for competitors to go into the business of producing glucose or corn syrup by devising a so-called profit-sharing scheme, by which it was proposed to give to all those who purchased from the combination a stipulated percentage upon the amount of the purchases made in one year to be paid at the end of the following year provided that during such time they dealt with no one else but the combination. While the sum of the percentage thus offered, it was alleged, varied from year to year, nevertheless it was charged that in substance the contract or offer remained the same. The tender to [170] the Manufacturing Company of a right to participate in the scheme, it was alleged, was first made in 1907 relative to the business done in 1906 in the form of

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a letter which is in the margin[a] and this offer or asserted contract was continued from year to year. It was further alleged that the scheme proved successful in accomplishing its wrongful purpose since, although subsequently independent concerns engaged in the business of manufacturing glucose or corn syrup and offered to sell their products at prices less than those charged by the combination, such concerns were virtually driven out of business because those who desired to purchase the products were deterred from buying from them for fear of losing the percentage which they would receive from the combination if all their purchases [171] continued to be made from it alone, and moreover because of the dread felt by purchasers that the independents would not be able to resist the overweening and controlling power of the combination. It was moreover alleged that all purchases made by the manufacturing company "contained the following clause in the contract of purchase: 'The goods herein sold are for your own consumption and not for resale.'"

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[a] "26 BROADWAY, NEW YORK, *March 9, 1907.*

"The D. R. WILDER MFG. CO., *Atlanta, Ga.*

"GENTLEMEN: This company recognizing the fact that its own prosperity, in a great measure, is interwoven with the good will and coöperation of its patrons, has decided to adopt a liberal plan of profit-sharing with you, in case you shall in the future continue to give us your exclusive patronage.

"This company inaugurates such a policy of profit-sharing by announcing that it will set aside out of its profits from the manufacture and sale of glucose and grape sugar for the last six months of 1906, an amount equal to ten cents per hundred pounds on all shipments of glucose and grape sugar (Warner's Anhydre and Bread Sugar excepted) which shall have been made to you by this company from July 1st to December 31, 1906.

"This amount will be paid to you or your successors on December 30, 1907, on condition that for the remainder of the year 1906 and the entire year 1907, you or your successors shall have purchased exclusively from this company or its successors all the glucose and grape sugar required for use in your establishment.

"With the assurance of steadfast coöperation of its customers, given in reciprocation for the benefits conferred upon them, this company confidently anticipates a continuance of such profit-sharing distribution annually to the full extent that its earnings may warrant.

"Yours very truly,

"CORN PRODUCTS REFINING COMPANY."

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Charging that the condition which made the payment of the proposed profit-sharing percentage depend upon dealing alone with the combination was void and should be disregarded, the answer asked not only that the prayer for judgment for the purchase price be rejected but that treating the failure of the Manufacturing Company to comply with the condition on which the offer of profit sharing was made as immaterial, there should be a judgment for that company for the percentage of profits on the business for the year 1908.

On motion the answer was stricken out as stating no defense. There was a judgment in the absence of further pleading against the Manufacturing Company for the price of the goods, as sued for, and rejecting its claim for the percentage of profits. This judgment was affirmed by the court below (11 Ga. App. 588) and because of an assumed failure to give effect to the Anti-Trust Act of Congress this writ of error was prosecuted.

As the context of the answer clearly justified the inference that the sale of the glucose was an interstate transaction, the court below was right in assuming that to be the case and therefore we put out of view as devoid of merit the contrary suggestion made by the Refining Company.

Having dealt with the Refining Company as an existing concern possessing the capacity to sell, speaking generally the assertion that it had no legal existence because it was an unlawful combination in violation of the Anti-Trust [172] Act was irrelevant to the question of the liability of the Manufacturing Company to pay for the goods since such defense was a mere collateral attack on the organization of the corporation which could not be lawfully made.[a] Besides, considered from the point of view of the alleged illegality of the corporation, the attack on its existence was absolutely immaterial because the right to enforce the sale did not involve the question of combination, since conceding the illegal existence of the corporation making the sale,

[a] *Finch* v. *Ullman*, 105 Missouri, 255; *Taylor* v. *Portsmouth, &c., St. Ry.*, 91 Maine, 193; *Smith* v. *Mayfield*, 163 Illinois, 447; *Detroit City Ry.* v. *Mills*, 85 Michigan, 634; *Mackall* v. *Chesapeake, &c., Canal Co.*, 94 U. S. 308; *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540.

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the obligation to pay the price was indubitable, and the duty to enforce it not disputable. This is true because the sale and the obligations which arose from it depended upon a distinct contract with reciprocal considerations moving between the parties—the receipt of the goods on the one hand and the payment of the price on the other. And this is but a form of stating the elementary proposition that courts may not refuse to enforce an otherwise legal contract because of some indirect benefit to a wrongdoer which would be afforded from doing so or some remote aid to the accomplishment of a wrong which might possibly result—doctrines of such universal acceptance that no citation of authority is needed to demonstrate their existence, especially in view of the express ruling in *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, applying them to the identical general question here involved.

The case therefore reduces itself to the question whether the contract of sale was inherently illegal so as to bring it within the also elementary rule that courts will not exert their powers to enforce illegal contracts or to compel wrong-doing. The only suggestion as to the intrinsic illegality of the sale results from the averments of the [173] answer as to the offer of a percentage of profits upon the condition of dealing exclusively with the Refining Company for the following year and the clause to the effect that the goods were bought by the Manufacturing Company for its own use and not for resale. But we can see no ground whatever for holding that the contract of sale was illegal because of these conditions. In fact it is not so contended in argument since substantially the proposition which is relied upon is that although such stipulations were intrinsically legal, they become illegal as the result of the duty to consider them from the point of view that one of the parties was an illegal combination interested in inserting such conditions as an efficient means of sustaining its continued wrong-doing and therefore giving power to accomplish the baneful and prohibitied results of its illegal organization,—a duty which, it is urged, results from reason, is commanded by the Anti-Trust Act and the obligation to enforce its provisions, and is required because of a previous decision

of this court enforcing that act (*Continental Wall Paper Co.* v. *Voight*, 212 U. S. 227) unless that decision is to be now qualified or overruled.

In the first place, the contention cannot be sustained consistently with reason. It overthrows the general law. It admits the want of power to assail the existence of a corporate combination as a means of avoiding the duty to pay for goods bought from it and concedes at the same time the legality of the condition in the sale and yet proposes by bringing the two together to produce a new and strange result unsupported in any degree by the elements which are brought together to produce it and conflicting with both.

In the second place, the proposition is repugnant to the Anti-Trust Act. Beyond question reëxpressing what was ancient or existing and embodying that which it was deemed wise to newly enact, the Anti-Trust Act was intended in the most comprehensive way to provide [174] against combinations or conspiracies in restraint of trade or commerce, the monopolization of trade or commerce or attempts to monopolize the same. *Standard Oil Co.* v. *United States*, 221 U. S. 1; *United States* v. *American Tobacco Co.*, 221 U. S. 106. In other words, founded upon broad conceptions of public policy, the prohibitions of the statute were enacted to prevent not the mere injury to an individual which would arise from the doing of the prohibited acts, but the harm to the general public which would be occasioned by the evils which it was contemplated would be prevented, and hence not only the prohibitions of the statute but the remedies which it provided were co-extensive with such conceptions. Thus the statute expressly cast upon the Attorney General of the United States responsibility of enforcing its provisions, making it the duty of the district attorneys of the United States in their respective districts under his authority and direction to act concerning any violations of the law. And in addition, evidently contemplating that the official unity of initiative which was thus created to give effect to the statute required a like unity of judicial authority, the statute in express terms vested the Circuit Court of the United States with "jurisdiction to

prevent and restrain violations of this act," and besides expressly conferred the amplest discretion in such courts to join such parties as might be deemed necessary and to exert such remedies as would fully accomplish the purposes intended. Act of July 2, 1890, c. 647, 26 Stat. 209.

It is true that there are no words of express exclusion of the right of individuals to act in the enforcement of the statute or of courts generally to entertain complaints on that subject. But it is evident that such exclusion must be implied for a two-fold reason: First, because of the familiar doctrine that "where a statute creates a new offense and denounces the penalty, or gives a new right and declares the remedy, the punishment or the remedy [175] can be only that which the statute prescribes." *Farmers' & Mechanics' National Bank* v. *Dearing*, 91 U. S. 29, 35; *Barnet* v. *National Bank*, 98 U. S. 555; *Oates* v. *National Bank*, 100 U. S. 239; *Stephens* v. *Monongahela Bank*, 111 U. S. 197; *Tenn. Coal Co.* v. *George*, 233 U. S. 354, 359. Second, because of the destruction of the powers conferred by the statute and the frustration of the remedies which it creates which would obviously result from admitting the right of an individual as a means of defense to a suit brought against him on his individual and otherwise inherently legal contract to assert that the corporation or combination suing, had no legal existence in contemplation of the Anti-Trust Act. This is apparent since the power given by the statute to the Attorney General is inconsistent with the existence of the right of an individual to independently act since the purpose of the statute was where a combination or organization was found to be illegally existing to put an end to such illegal existence for all purposes and thus protect the whole public—an object incompatible with the thought that such a corporation should be treated as legally existing for the purpose of parting with its property by means of a contract of sale and yet be held to be civilly dead for the purpose of recovering the price of such sale and then by a failure to provide against its future exertion of power be recognized as virtually resurrected and in possession of authority to violate the law. And in a two-fold sense these considerations so clearly demonstrate the conflict between

the statute and the right now asserted under it as to render it unnecessary to pursue that subject further. In the first place because they show in addition how completely the right claimed would defeat the jurisdiction conferred by the statute on the courts of the United States—a jurisdiction evidently given, as we have seen, for the purpose of making the relief to be afforded by a finding of illegal existence as broad as would be the necessities resulting [176] from such finding. In the second place because the possibility of the wrong to be brought about by allowing the property to be obtained under a contract of sale without enforcing the duty to pay for it, not upon the ground of the illegality of the contract of sale but of the illegal organization of the seller, additionally points to the causes which may have operated to confine the right to question the legal existence of a corporation or combination to public authority sanctioned by the sense of public responsibility and not to leave it to individual action prompted it may be by purely selfish motives.

As from these considerations it results not only that there is no support afforded to the proposition that the Anti-Trust Act authorizes the direct or indirect suggestion of the illegal existence of a corporation as a means of defense to a suit brought by such corporation on an otherwise inherently legal and enforceable contract, but on the contrary that the provisions of the act add cogency to the principles of general law on the subject and therefore make more imperative the duty not directly or indirectly to permit such a defense to a suit to enforce such a contract, we put that subject out of view and come to the only remaining inquiry, the alleged effect of the previous ruling in the Continental Wall Paper case, *supra*.

It is to be observed in considering that contention that the general rule of law which we have stated is not apparently questioned in the argument and the controlling influence of the ruling in the Connolly case, *supra*, if here applicable is not denied, but the contention is that the general law is not applicable and the Connolly case is inapposite because of an exception which was engrafted upon the

general law by the ruling in the Continental Wall Paper case, under which it is said this case comes. While it clearly appears that this is the contention, it is difficult to precisely fix the ground upon which it is rested. But as the rule of general law which under ordinary cir[177]cumstances does not permit the existence of a corporation to be indirectly attacked is not assailed, and as it is not asserted that irrespective of the illegal organization of the corporation, the contract of sale was inherently unlawful, it follows that the proposition is the one which we have already in another aspect disposed of, that is, that the sale and its conditions, although inherently legal, become illegal by considering the illegal corporation and the aid to be afforded to its wrongful purposes by the conditions which formed a part of the sale. But in substance this only assumes that it was held in the Continental Wall Paper case that that which was inherently legal can be rendered illegal by considering in connection with it something which there was no right to consider at all. But it is apparent on the face of the opinion in the Continental Wall Paper case that it affords no ground for the extreme and contradictory conclusion thus deduced from it, since the ruling in that case was based not upon any supposed right to import into a legal and valid contract elements of wrong which there was no right to consider, but was rested exclusively upon elements of illegality inhering in the particular contract of sale in that case, which elements of illegality may be thus summarized: (*a*) The relations of the contracting parties to the goods sold, (*b*) the want of real ownership in the seller, (*c*) the peculiar obligations which were imposed upon the buyer, and (*d*) the fact that to allow the nominal seller to enforce the payment of the price would have been in and of itself directly to sanction and give effect to a violation of the Anti-Trust Act inhering in the sale. It is not necessary to analyze the facts and issues in the case for the purpose of pointing out how completely they are covered by the statement just made because the opinion of the court and the reasons stated by the members of the court who dissented without more make that fact perfectly clear. In-

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deed, not only does this statement make clear the fact [178] that there is no conflict between the Connolly case and the Continental Wall Paper case, but it also establishes that both cases, the first directly, and the other by a negative pregnant, demonstrate the want of merit in the contentions here insisted upon.

It only remains to say that we think it requires nothing but statement to demonstrate that in view of the facts which we have recited and the legal principles which we have applied to them, no error was committed by the court below in refusing to give to the defendant a judgment for its alleged share of the profits for the year 1908 when it was expressly admitted that the conditions upon which the offer of a right to a participation in the profits was rested, or the contract (if there was a contract to that effect) was based, had not been complied with.

Affirmed.

UNITED STATES *v.* CORN PRODUCTS REFINING CO. ET AL.[a]

(District Court, S. D. New York. June 24, 1916.)

[234 Fed. Rep., 964.]

MONOPOLIES 17(1)—ANTI-TRUST ACT—COMBINATIONS IN RESTRAINT OF TRADE.—Defendant Corn Products Refining Company, which on its organization in 1906 acquired control of all the glucose plants in the United States and of starch factories producing 64 per cent of the total production, *held* an illegal combination in restraint of interstate trade, and to monopolize the same, in violation of Sherman Anti-Trust Act July 2, 1890, c. 647, §§ 1, 2, 26 Stat. 209 (Comp. St. 1913, §§ 8820, 8821), on evidence showing that the purpose of its organization was to prevent competition, and that the power acquired by the combination was exercised to prevent by unfair means new competitors from entering the field, and to drive out those entering or already engaged in the business, through profit-sharing contracts with customers which required them to continue to purchase from it exclusively for more than a year afterward to entitle them to the benefit of the contract in any particular pur-

[a] This case is pending in the Supreme Court on the appeal of the defendants.

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chase; by a contract with a new [965] competitor, induced by threats of entering into competition in another branch of the competitor's business, by which it obtained one-half the glucose production of the new plant and sold the same at a loss through secret agents purporting to represent independent makers for the purpose of preventing others from entering the business; by the sale of mixed syrups, of which it acquired control of more than half the production, at little or no profit, and at prices which left no profit to independent mixers, who were compelled to buy their glucose in the market; and by other price manipulations and local discriminations, all of which were more or less successful in maintaining its monopoly.[a]

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 13; Dec. Dig. 17(1).]

MONOPOLIES 17(2)—ANTI-TRUST ACT—CONTRACTS IN RESTRAINT OF TRADE.—Profit-sharing contracts put in practice by a manufacturer of glucose and grape sugar, which at the time had practically a monopoly, by which 10 cents was set aside for each 100 pounds of product sold to a customer, and paid to him at the end of the following calendar year, provided he had not in the meantime purchased from any other producer, when adopted as part of a general scheme to prevent competition, are contracts in restraint of trade, in violation of Sherman Anti-Trust Act July 2, 1890, c. 647, § 1, 26 Stat. 209 (Comp. St. 1913, § 8820).

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 13; Dec. Dig. 17(2).]

MONOPOLIES 24(2)—COMBINATIONS IN RESTRAINT OF TRADE—REMEDY.—In considering the question of the dissolution of an illegal combination of manufacturing concerns, which has by the export of the product of one of its plants near the seaboard built up a successful foreign trade, relying on its other plants to supply the domestic market, the court cannot undertake to determine whether the public injury from the loss of such trade, which might result from the severance of such plant, because, if operated independently, its product might be sold in the domestic market, would outweigh the benefit to the public of the increased competition in the home market.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 17; Dec. Dig. 24(2).]

MONOPOLIES 24(2)—COMBINATIONS IN RESTRAINT OF TRADE—REMEDY—DISSOLUTION.—Where an illegal combination of a majority of the plants in the country in a line of manufacture has persistently, through a number of years and in various ways, used the power given by the combination to interfere with the free course of commerce which the law demands, the remedy by injunction alone is

inadequate, and to be effective should extend to a decree of dissolution.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 17; Dec. Dig. 24(2).]

In Equity. Suit by the United States against the Corn Products Refining Company, the National Starch Company, the St. Louis Syrup & Preserving Company, the Novelty Candy Company, Penick & Ford, Limited, Edward T. Bedford, William J. Matheson, Frederick T. Bedford, Frederick T. Fisher, C. H. Kelsey, A. B. Boardman, George S. Mahana, George M. Moffett, William H. Nichols, jr., A. A. Smith, James Speyer, E. Beverly Walden, C. M. Warner, Thomas P. Kingsford, R. S. Burns, F. A. Lohmeyer, Benjamin Schneewind, C. W. Lohmeyer, Edward T. Bedford, 2d, A. N. Watkins, C. H. Lorenz, Louis Suss, William S. Penick, jr., and James P. Ford. On final hearing. Decree for complainant.

[966] This is a petition under the Sherman Act by the United States for an injunction and a dissolution of the defendant Corn Products Refining Company, because of a monopolization and a restraint of interstate and foreign commerce, and because of a conspiracy to monopolize and restrain such commerce, in the manufacture and sale of starch, glucose, grape sugar, and in the mixing of glucose with the refiners' syrup, molasses, or other syrups. The individual defendants are the officers and directors of the defendant Corn Products Refining Company and of the corporate defendants, National Starch Company, St. Louis Syrup & Preserving Company, and Novelty Candy Company. There are also joined in the petition the president and directors of a Louisiana corporation, Penick & Ford, Limited, and the corporation itself. The petition sets forth that the principal products derived from corn are: (1) Starch for food and laundry purposes; (2) glucose or corn syrup; (3) grape sugar or corn sugar. It then sets forth the history of the defendant corporations from the year 1897, alleging the combinations from which by a series of reorganizations the defendant Corn Products Refining Company arose in 1906 and the National Starch Company in 1900, and the subsequent

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acquisition by the Corn Products Refining Company of the stock in the St. Louis Syrup & Preserving Company and Penick & Ford, Limited. It then asserts that the Corn Products Refining Company and the National Starch Company grind 66 per cent of the entire production of starch and glucose in the United States, and by means of the control so created, monopolize, and attempt to monopolize, interstate and foreign commerce in starch, glucose, and other corn products; that they control likewise 80 per cent of such commerce in mixed syrups, as so defined. It then alleges ten sorts of unfair trade practices by the defendants, as follows:

(*a*) By means of the combinations before set forth.

(*b*) By means of the dismantling and sale of certain of its plants which had been acquired in excess of their real value.

(*c*) By means of contracts secured from officers of the corporations consolidated agreeing not to enter into manufacture within 1,500 miles of Chicago for stated periods of time.

(*d*) By means of profit-sharing agreements until the year 1910.

(*e*) By means of a guaranty in all sales of its goods against the decline in price.

(*f*) By means of an agreement with the American Maize Products Company by which certain of its glucose purchased by Corn Products Refining Company should be sold at low prices under the guise of sales by independent manufacturers.

(*g*) By means of threats against the National Candy Company that it would enter into the candy business if the said National Candy Company should enter the glucose business and by the organization of the Novelty Candy Company for that purpose.

(*h*) By means of fixed prices for the sale of corn products at unreasonably low figures for the purpose of harassing independent manufacturers and by the low price of its own brand of mixed syrup, "Karo," and by driving out the private brands of other individuals.

(*i*) By means of fixing retail prices.

(*j*) By means of freight rebates obtained under the cover of allowances for switching service.

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The petition prays that the defendants (1) be declared to be combinations in restraint of trade and attempt to monopolize such trade; (2) that the defendants be decreed to have entered into contracts in restraint of interstate and foreign trade and to be engaged in the effort to restrain and destroy trade; (3) that the court adjudge Corn Products Refining Company a combination in restraint of trade and a monopolization thereof; (4) for such other relief as may be necessary.

The answer admits the first three articles of the petition and certain facts in the other articles. It will not be necessary for the decision of the case to particularize these admissions of the answer, as the substance of the proof is considered in the later discussion. The eighth article of the answer on behalf of the individual defendants James Speyer, A. B. Boardman, Clarence H. Kelsey, and W. H. Nichols, jr., denies any connection with the Corn Products Refining Company except after certain dates therein mentioned.

[967] The petition was filed in March, 1913, the answer on April 9, 1913. The Government commenced taking testimony on June 10, 1914. Testimony was taken thereafter out of court until about the end of 1915, after which the case came on for a hearing on January 10, 1916, before Hon. Learned Hand, District Judge, and testimony on both sides was completed. It was thereafter argued in March, 1916. Meanwhile, and on May 14, 1915, an interlocutory decree had been taken by consent effecting a dissolution of the combination, so far as it had gone, of Corn Products Refining Company with Penick & Ford, Limited, by the sale of all securities already purchased, and forbidding the defendant from acquiring any other securities in that corporation or in any other fashion acquiring any interest or control in it.

The following statement of facts is made for the most part in chronological order, stating separately the conditions of the starch and glucose industries until 1902, at which time they were first combined in the formation of the Corn Products Company. The starch industry before 1902 is taken up in three periods: (1) That prior to 1890, the date of the formation of the National Starch Manufacturing Company;

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(2) that from 1890 to 1900, the date of the formation of the National Starch Company; (3) the period from 1900 to 1902. The history of the glucose industry is considered in two periods: (1) That prior to 1897, the date of the formation of the Glucose Sugar Refining Company; (2) that from 1897 to 1902. The conditions of the joint industry are then considered in two periods: (1) That from 1902 to 1906, until the formation of Corn Products Refining Company; (2) that from 1906 until the close of the testimony. In the consideration of the period from 1906 to the present time the various practices adopted by the Corn Products Refining Company are themselves considered in chronological order along with the development of the industry itself. At the conclusion of this statement of facts the various allegations of the petition are taken up in the order stated in the petition, and formal findings of fact are made upon all of them. Finally, appears a discussion of the law deemed applicable and of the conclusions of law made by the court, together with such remedies as the facts and the law require.

Jesse C. Adkins, of Washington, D. C., and *Van Sinderen Lindsley*, of New York City, for the United States.

Morgan J. O'Brien, of New York City; *James M. Sheean*, of Galena, Ill.; and *Albert B. Boardman* and *Preston Davie*, both of New York City, for defendants.

I. THE CONDITION OF THE STARCH INDUSTRY IN 1890.

LEARNED HAND, District Judge (after stating the facts as above).

[1] Starch is used for mill, laundry, and food purposes and is sold both in bulk and in packages. Its method of manufacture at the present time is not in substance different from that employed 26 years ago. The raw product is the ordinary Indian maize or corn, which is bought already separated from the husk, and is first soaked or steeped in hot water impregnated with sulphur. The water is left upon the kernel until it is quite soft, when it is run between two plates of rough, coarse teeth, which break it up and

disintegrate the germ from the starch proper, after which both germ and starch are run into vats and allowed to rest. The germ, being the lighter part, floats to the top and passes over the lip of the vat into a separate container. The remainder contains the starch proper and the husk, although with the germ has gone off a certain amount of starch, which under improved methods is later reclaimed. The residual emulsion of starch and husk falls into a second grinder, like an ordinary miller's grindstone, where it is ground into a very soft pulp. The husk is separated [968] from the starch in emulsion by revolving on the inside of silk screens. At the lower end of the screens the husk is carried off. Through the meshes of the silk flows out the true emulsion of starch in liqueous form, which is then poured upon long tables with a very slight slope, on which the starch settles to the bottom, and the gluten, an element of the starch, flows off at the end of the table. After the tables have been filled with a solid cake of starch, it is dug out by shovels, pulverized or macerated in a moist condition, and delivered upon tables, whence it goes into racks, which are in turn run into long kilns. The starch is dried in the kilns by the passage of hot air constantly blown through it, until all the moisture has been evaporated. After it is quite hard and dry and brittle, it is broken up as fine as necessary. Powdered starch is what has been ground into fine powder; pearl or mill starch, what has been broken into lumps of considerably greater size. This is the end product of the process and is sold as such. In the manufacture of the package starch, which is used for the most part for edible purposes, the process is the same, except that greater care is exercised to assure the absence of all impurities. There are some variations, also, in the production of "lump starch" and its mechanically produced equivalent, "pressed starch," but these are not important. Certain by-products result from this process, which it is not necessary to consider, but which in the later stages of the industry have assumed a very important part in its returns.

In the year 1890 there were 22 or 23 small plants for the manufacture of starch, situated for the most part in the

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corn belt of the Middle West, except several at Buffalo, one at Oswego, and one at Glen Cove, Long Island. These had a small capacity, ranging from 200 to 1,800 bushels of corn a day, except the Glen Cove Manufacturing Company, which could grind 7,500 bushels. This was the only plant at that time manufacturing both glucose and starch, and had a glucose capacity of 5,000, the rest going into starch. These companies in some instances had been over 65 years in existence, the best-known brands being those of Kingsford at Oswego and of Duryea at Glen Cove, each of which were for edible starches and were of great value. Of these plants, some 20 were combined in 1890 into the National Starch Manufacturing Company, through the active promotion of one Chester W. Chapin, of New York. The National Starch Manufacturing Company was organized with a capital stock of $10,500,000, and a first mortgage 6 per cent bond issue of $4,500,000, making $15,000,000 in all. Like most combinations of that character, it had been preceded by a very severe competition for a number of years; many of the plants working at less than their full capacity, some being actually in the hands of receivers. Prices had been cut severely, in some cases even below the cost of production. The combination was not effected as a trust, but as a holding company, the National Starch Manufacturing Company acquiring the stock of its constituents. The owners of the companies purchased as part of the consideration generally contracted not to engage in the manufacture of starch or glucose for a period of 5 years.

This combination centered into one control between 75 per cent and 80 per cent of the starch business in the United States. Its plants had a capacity of between 230,000,000 and 240,000,000 pounds, and were [969] producing in 1890 about 200,000,000 pounds of starch yearly. The competition thereafter consisted of the American Starch Company, the Graves Company (the starch plant of the American Glucose Company), Kingford's Company, and two or three other starch plants, together with starch made by the glucose factories. Shortly after the organization in 1890 a number of the old plants were closed down, for the purpose of economizing,

reducing expense, and saving cross freights. There is no certain evidence to indicate that they were closed for the purpose of limiting the total starch production, but it is probable that the total possible production exceeded the capacity of the market at a living profit. This combination was made for the purpose of getting a control of the starch industry, sufficient to fix prices and regulate the supply, and in this way monopolizing it. By taking in so many outside producers, it was hoped that the preceding competition would disappear.

II. THE STARCH INDUSTRY BETWEEN 1890 AND 1900.

In August, 1899, the United Starch Company was organized. It included Kingsford's Starch Company, a company at Sioux City, the Graves plant at Buffalo, and the Argo Manufacturing Company of Nebraska. Less than a year later was formed the National Starch Company, in April, 1900, under the promotion of Joy Morton, by a combination of practically all the stock of the National Starch Manufacturing Company, the United Starch Company, and the United States Glucose Company, which was a holding company for the stock of the United States Sugar Refining Company. The National Starch Company continued an independent existence until the first great combination of the starch and glucose industries of 1902, which was formed for the same reason as the others. Competition before 1900 had again become very severe, and it was hoped that the consolidation would reduce costs and improve profits. The National Starch Company on its formation controlled substantially all the starch manufacture in the United States, except that produced by the glucose manufacturers as an incident to their business. It also was formed for the purpose of monopolizing the starch industry by controlling production and prices, through combining with outside producers, and in this way restraining the competition which the previous 10 years had developed.

III. THE GLUCOSE INDUSTRY IN 1897.

Glucose is made by taking the starch emulsion as it comes from the table and mixing with it a small percentage of acid

in a large bulk of water, the whole being violently agitated. The acid has the property of combining the molecules of the starch and the molecules of the water into molecules of glucose. After the agitation is completed the emulsion is allowed to flow down into a converter under heat and pressure, and after a proper period an alkali, such as soda ash, is added, which combines with the added acid and produces a common salt. The next process is to strain off the salt and impurities in a bone-ash filter, after which the glucose is reduced to proper density for transportation, usually 42° Baumé scale. Grape sugar is solid glucose, ex[970]cept that, owing to a detail in the process of manufacture, it takes on a thick, brownish-yellow viscous appearance, while the glucose is a pellucid fluid. The grape sugar is poured off into open pans and allowed to crystallize in the air, like any other sugar, after which it is broken up into lumps. Glucose is used by syrup mixers and confectioners; grape sugar is used in the brewing and tanning trades.

In 1897 there were seven glucose manufacturers in the United States, counting as one the two factories of Charles Pope Glucose Company at Venice and Geneva, Ill. Of these the earliest incorporated was the Peoria Grape Sugar Company in 1879. During the period from 1885 until 1890 pools had been established between these companies; there being no division of territory, but each member of the pool being obliged to pay a penalty in case he sold more than his allotted percentage. In November, 1890, the pools either fell by their own weight or were voluntarily abandoned, and for 6 years a period of active and severe competition ensued. The largest and most powerful of these companies was the Chicago Sugar Refining Company of Chicago and the next the American Glucose Company. A combination in the form of a holding company was effected in 1897, which took in all of these companies but the two plants of Charles Pope at Venice and Geneva, and also so much glucose as was made in the plant of the Glen Cove Manufacturing Company, at that time consolidated with the National Starch Manufacturing Company. Pope's total capacity was 16,000 bushels a day, of which, however, about

one-third went into starch and two-thirds into glucose. The capitalization of the Glucose Sugar Refining Company was $40,000,000; the daily grind was 100,000 bushels. Like the combination in the starch industry, the stock was heavily watered; but the amount of production remaining outside of the combination was only of trifling amount, so that the control over the industry was even more complete. A certain portion of the stock was retained for the purpose of acquiring the complete control of the industry by the purchase of the Charles Pope Company, if that should later become feasible. The combination was at one time interrupted through legal proceedings by George F. Harding, a stockholder of the American Glucose Company; but he was eventually bought off after the Supreme Court of Illinois had declared the proposed combination to be illegal. *Harding* v. *American Glucose Co.*, 182 Ill. 551, 55 N. E. 577, 64 L. R. A. 738, 74 Am. St. Rep. 189. This combination was made for the purpose of monopolizing the production of glucose by controlling the price and supply of the product. Like the starch combinations, it was thought that the integration of all producers would prevent future competition.

IV. THE GLUCOSE INDUSTRY BETWEEN 1897 AND 1902.

After the formation of the Glucose Sugar Refining Company, the prices rose at once, and there was no competition until the year 1901, except from Charles Pope and the Glen Cove Manufacturing Company, of which the latter was almost negligible on account of its disadvantageous location. In 1901 the Illinois Sugar Refining Company, which had been originally built as a beet-sugar refinery, came into the [971] market as a glucose manufacturer with a capacity of 13,000 or 14,000 bushels, and in the same year was formed the New York Glucose Company, at Edgewater, N. Y., which commenced operations in 1902 with a capacity of 30,000 bushels. This latter corporation was under the direction of men who had all been active in the Standard Oil Company, as was generally known throughout the industry. It proposed to make both glucose and starch, as did also the Illinois Sugar Refining Company.

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In the year 1901, therefore, it became apparent that the existing monopoly of the glucose industry at that time enjoyed by the Glucose Sugar Refining Company, with the exceptions above mentioned, was to be threatened. The National Starch Company likewise was threatened, in addition to the competition already existing from the glucose plants by the new plants already mentioned. These conditions created the combination of 1902, known as the Corn Products Company.

V. THE CORN PRODUCTS COMPANY FROM 1902 TO 1906.

In February, 1902, the Corn Products Company was organized, with a total capitalization of $80,000,000 of stock. It, too, was a holding company, like its predecessors, and acquired practically all the stock of the Glucose Sugar Refining Company, the National Starch Company, the Illinois Sugar Refining Company, the Charles Pope Glucose Company, and 49 per cent of the New York Glucose Company. It is not now denied that in its organization the corporation was grossly over-capitalized, and that it was a typical instance of the kind of financing which was common in the year 1902, in which it is no exaggeration to say that no attention was paid to the actual value of the properties included. As taken from its stock-listing statement, the total grind of the Glucose Sugar Refining Company at that time was 105,000 bushels, of the National Starch Company 43,000 bushels, of the Illinois Sugar Refining Company 15,000 bushels, and of the Pope Company 15,000 bushels. The capacity of the New York Glucose plant, which at that time had not actually begun operations, was between 20,000 and 30,000 bushels. The total capacity, therefore, of all the plants combined into the Corn Products Company was between 200,000 and 210,000 bushels a day. So far as can be ascertained, every starch or glucose plant throughout the country was taken into the combination, which therefore exercised a complete monopoly, so far as combination could secure it, and this was, of course, its purpose. Restrictive covenants were executed by Pope and

by the chief owner of the Illinois Sugar Refining Company and were refused by William F. Piel.

After the formation of the company, Conrad H. Matthiessen, its president, manipulated the prices of glucose and starch quite independently of the price of corn, alternately raising and lowering it as the immediate occasion seemed to require. At the outset prices were at once raised and for a portion of the year 1902 maintained. Shortly thereafter, however, friction developed between the Corn Products Company and the New York Glucose Company, of which E. T. Bedford was the president. In March, 1903, a year after the combination, the relations of the two corporations had become strained, and Bedford [972] resigned as director of the Corn Products Company. Meanwhile, and in 1903–1904, as the result of the combination in question, other plants began to appear. One of these was that of J. C. Hubinger Bros., of Keokuk; the second was a new starch plant erected by Piel, in Indianapolis; a third that of Douglas & Co., at Cedar Rapids; a fourth, the Union Starch & Refining Company, at Edinburg, Ill.; a fifth the Keever Starch Company, of Columbus; and a sixth, the Huron Milling Company, of Harbor Beach, Mich. All of these were small companies, many of them engaged in the manufacture of what are known as specialties, and none of them of much consequence so far as concerns the control of the industry. The high prices and the combination, however, attracted larger companies into the field. In 1904 Winterman, a syrup mixer, of Granite City, Ill., built a glucose plant of 12,000 bushels at that city. In the same year the Warner Sugar Refining Company, at Waukegan, Ill., reconstructed its own factory, which had formerly been discontinued, and started with a glucose capacity of 18,000 bushels, which in 1905 was increased to 25,000. This factory made all the products arising from the process of wet milling. The Goyer-Alliance Refining Company attempted the erection of a plant of 10,000 bushels in 1905 at Bell-Alliance, La., but owing to an outbreak of yellow fever this was discontinued and failed. A small Cereal Sugar company also was organized at Waukegan and subsequently bought over by Warner.

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The competition developed during the years 1904–1905 and became very bitter. The Corn Products Company, with a number of antiquated plants, was in no proper position to pay dividends upon its grossly watered capitalization, although it actually continued to do so. As a result its plants ran down in manufacturing efficiency and its stockholders threatened suit. The more powerful competing companies were not so much affected by the combination, as they were more modern and of a higher manufacturing efficiency, especially the New York Glucose Company, which was at that time the model plant in the country. All producers, however, decided that competition was ruinous and that the time had come for another combination in order to preserve them from its effects. From this resulted the formation of the defendant Corn Products Refining Company, which purchased practically all the stock of the Corn Products Company, of the Warner Sugar Refining Company, and of the St. Louis Syrup & Preserving Company, the outstanding 51 per cent of the stock of the New York Glucose Company, and the majority of the stock of the small Cereal Sugar Company. The companies so purchased, exclusive of Corn Products Company, were at that time jointly doing about 50 per cent of the entire domestic and export business of the glucose and starch industry.

VI. FORMATION OF THE CORN PRODUCTS REFINING COMPANY IN 1906.

In its origin, the defendant Corn Products Refining Company was a holding company, with a capitalization of $80,000,000 of stock, of which about $75,000,000 was issued. This involved the scaling down of the capitalization of the Corn Products Company, which was ac[973]complished by compelling the stockholders to take two shares in the new company for three in the old. The stock of the New York Glucose Company, $1,275,000, was exchanged for $5,000,000 of preferred stock and $4,000,000 of common. The purchase of the St. Louis Syrup & Preserving Company and Warner Sugar Refining Company was accomplished in part by cash. The total grinding capacity so consolidated, by the state-

ment of the Corn Products Refining Company itself, amounted to 235,500 bushels. There were left outstanding at the time of the consolidation no glucose manufactories in the United States, though a very substantial starch capacity; for example, in the year 1906 the defendant Corn Products Refining Company did 100 per cent of the glucose manufacturing and only about 64 per cent of the starch.

There were six companies altogether left out of the combination, of which the largest were the Piel and the Douglas companies; but the aggregate grind of these six outside companies together was only 3,384,961 bushels, all of which went into starch. On the basis of grind the Corn Products Refining Company had about 91 per cent of the total production; on the basis of starch, as just said, only about 64 per cent. Restrictive covenants were procured from the Warners for a period of 10 years and from the Wintermans of the St. Louis Syrup & Preserving Company. Some of the old covenants of the Corn Products Company still remained outstanding and came to the Corn Products Refining Company as part of its assets.

1. CAUSES OF THE COMBINATION.

This combination of 1906 was caused primarily by the character of the competition theretofore existing under which such low prices had been reached. The income of the Corn Products Company during 1905 had fallen to less than $500,000, and much of its plant had been allowed through several years to fall into a dilapidated condition. This condition had no doubt largely arisen from the improper declaration of the dividends, most of which ought to have been put back into the property to keep it in condition. Indeed, there is no reason to suppose that, during the period of the existence of the Corn Products Company, its actual earnings were not an ample profit upon the actual value of the property, and although the trade war had very seriously affected the New York Glucose Company and the other companies taken in at that time, their earnings also had been substantial.

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2. CONDITION OF THE PLANTS TAKEN OVER IN 1906.

Of all the plants taken over in 1906, only eight had been operated during the previous year. I think it must be assumed that these constituted the heart of the enterprise. Many of the Corn Products Company's plants had become antiquated and inefficient relatively to a contemporaneous construction. Edgewater and Granite City had been independent, and with Pekin were at the time all new plants, and the first two were in high efficiency. It is doubtful whether Pekin, which had been built as a beet-sugar plant, was ever well arranged. Chicago, which was a great producing plant, was certainly in its last stages, and was wisely abandoned within two years. Warner's Waukegan plant [974] had been independent, and was also a modern plant of high efficiency, though probably a little run down. Of the starch plants proper the best were Oswego, Indianapolis, and the United States Sugar Refining Company's Waukegan plant, all of which were in tolerable condition. Besides these, the Corn Products Refining Company had inherited a number of starch plants which had been closed by the Corn Products Company, many of them plants of the old National Starch Company, which were confessedly in the most deplorable condition. Possibly in many cases these had been closed by the Corn Products Company to avoid over-production, yet it must be admitted that in the year 1905, when the competition was severest, no effort was made to open them. My conclusion is that those closed down were not, either by their size, their situation, or their physical equipment and structure, capable of effective production. To have made them so would have been to increase a production already greater in volume than the market would bear, and would have stolen from dividends, which for ulterior reasons the Corn Products Company wished to maintain. I believe that these plants, while, as I have said, they were originally combined in an effort through monopoly to control the market, were not closed down by the Corn Products Company in order to keep the price above the fair cost of production.

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VII. CONTROL OF THE GLUCOSE AND STARCH TRADE BY THE CORN PRODUCTS REFINING COMPANY.

Since 1906 the proportion of the industry based upon total grind controlled by the Corn Products Refining Company has fallen, in whatever method that may be calculated, and both absolutely and relatively the portion of the industry done by the independents has increased. Three new companies have come into the field—the first, A. E. Staley Manufacturing Company, of Decatur, began to grind only in the year 1912; the second, the Clinton Sugar Refining Company, began in 1907; and the third, the American Maize Products Company, in 1908. The total aggregate of grind of the nine independent companies existing on December 31, 1913, had risen from about 3,000,000 to 17,500,000 bushels, and the total grind of the Corn Products Refining Company during that year was a trifle less than in the year 1906. The proportions for 1913 are, Corn Products Refining Company 65 per cent, independents 35 per cent, and with one exception the decrease in proportion has been constant. The actual grind of Corn Products Refining Company has remained not far from constant, varying between 35,000,000 in 1910 and 26,000,000 in 1908. In 1913 it was substantially the same as in 1906. 1914 is an unsafe year upon which to base any estimate in absolute quantities, as the great war occurred. I have, however, occasionally used the percentages.

The proportion of this grind distributed to glucose and grape sugar shows a greater change during the period in question than the grind itself. There is a steady decline in the percentage of total glucose production, domestic and foreign, attributable to the defendant Corn Products Refining Company, until in the year 1913 the total percentage is only 57 per cent and in 1914 53 per cent. The change in the percentage of grape sugar production is not great; in 1914 it was still over [975] 90 per cent of the whole. Of starch, in 1906 the defendants' percentage was about 64, and actually increased to more than 70 per cent in the years 1907, 1910, and 1911. In 1912 it fell to 67 per cent, and in 1913 to 63 per cent, so that the net change for 8

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years was practically nil. However, in 1914 it fell to about 58 per cent. I think it a fair inference from the tables that the percentage of production of the Corn Products Refining Company is on the whole surely, but certainly, decreasing, due to the absolute increase in the grind of its competitors and its own inability permanently to increase very substantially its own grind. It would be obviously futile to attempt any forecast of the industry.

The defendants urge that in considering their control of the industry there should be included in total production not only the starch or glucose production, but also those substances with which the starch and glucose come into competition in their end products. Thus they say that the pearl and powdered starch come into competition with the grits of the dry-corn millers in the brewing trade, and that the dextrines and gums come into competition with those made from other substances than corn. They say that in the mill trade the corn starch comes into competition with sago, tapioca, potato, and wheat starches; that the syrups made from 85 per cent to 90 per cent glucose come in competition with those made with much less; that candy contains all sorts of percentages of glucose. So, they argue, the whole of these industries must be considered in order to get any fair estimate of the amount of the control exercised by the Corn Products Refining Company.

This argument may best be met by an illustration for which I will take as an instance one much pressed by the defendants, i. e., that of the competition of the pearl starch, under the name "refined grits," with the dry millers' similar article, "brewers' grits." What the brewer, the buyer, wants is maltose, and he will buy it indifferently from the wet or dry miller as he gets more maltose for his money. The production of maltose is, however, by a different process in the one case from the other, and the proportion of maltose is as 90 to 73 in favor of "refined grits." So long as the cost of production per unit of maltose favors the "refined grits," a producer who controls its means of production has a monopoly limited only by the amount of that differential. It is quite true that, if for any reason the monopolist of the

cheaper material raises the price to that of the dearer, he will at once meet with the competition of the sources of supply so thrown open by his advance. Thereafter he cannot be properly called a monopolist, unless the supply thus opened is so insubstantial as not to affect the market. In short, his monopoly, where the two commodities compared are indistinguishable in use, is limited by the actual differential in the cost of production between them. Such a monopoly is therefore only a limited one, but within the limits it may be a true one.

There is no very definite evidence of the relative cost of production of "refined grits" and "brewers' grits," but in Bedford's testimony he speaks of the dry millers' cheaper production and cheaper construction, and how at times it drove them to sell below cost. If the dry process was cheaper per unit of maltose than the wet process, obvi[976]ously the dry process only would hold the market, unless the dry millers added to their profit all the differential in cost of production. If they did that, the wet millers would come into competition with them. If not, the wet millers' competition must be only sporadic, or to force a demand in the hope of establishing a market and in the end lowering cost.

The relevancy of all this is only as follows: If the wet process is cheaper than the dry, then, although a monopoly of the wet will be limited by the dry, it is improper to consider the production of the dry millers when ascertaining the proportion of production controlled by a supposed monopolist of wet milling. If, on the other hand, the dry process is cheaper than the wet, and if, which would be hardly possible, a sustained competition between them existed, then one could not disregard the dry production for all purposes. In that case one ought to eliminate from the supposed monopolist's production that part of the grind which went to "refined grits," but that would be the only correction necessary. The rest of the grind would not come into competition with the brewers' grits or with the dry millers' upon the same conditions, i. e., indistinguishability in use and less cost of production.

The evidence contains nothing which would permit the application of any such refinement of reasoning. I have

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elaborated upon it, not because I think it has any practical bearing upon this case, but for the sake of analyzing the contention of the defendants that all the products which they vaguely say come into competition with them must be considered. This is certainly far from true; it is only true under those very limited conditions above set forth. In the case of the sago, potato, corn, and wheat starches it is not true at all, because those have both a distinguishable use value and a higher cost of production. The most that can be said of them is that they do afford a substantial limit upon the wet millers' price, because they would come in if it got high enough. Like any other monopoly, even a legal one, there is a limit of price at which substitutes will displace the cheaper commodity.

When we come to the syrups and the candies, the distinction is even more plain. Syrup with 90 per cent or 85 per cent glucose is a different article from that with 40 per cent. So is candy. If either is honestly sold, the purchaser will know the difference. He does not buy, like the brewer, to get a percentage of maltose; he buys the whole mixture as he likes it. If the public at large prefers low-glucose syrups, which in most parts of the country are dearer, the high-glucose syrup mixer's profit will be limited by that difference in selling price which will offset the preference in taste. That will always be a limit depending upon the palate of the public, but within that limit the question of monopoly must be considered, without regard to the production of lower percentage syrups. On the other hand, where the cane syrups are cheaper, as is said to be the case in the South, there the wet miller, to sell at all, must find or create a preference for glucose syrup over cane syrup. His margin of profit, and with it the only room for monopoly, will be within such compass as the consumer's preference will tolerate a difference in price.

The tables prepared by the Government must therefore be accepted [977] implicitly with the foregoing limitations. As such they are reliable to ascertain the proportion of the defendants' production to the whole, and I have used them as such. It is proper to make one table for both foreign and domestic commerce, since it rests in the will of the producer to

sell in either market. Indeed, this interchangeability of the markets is the implied basis of one of the strongest arguments made by the defendants to oppose dissolution, as will later appear. It is also proper to include the specialties, so called, such as grape sugar, dextrines, thin-boiling and package starches and syrups. These are end products out of a raw material controlled by the wet millers, taken as an industry. What they choose to put into specialties, what they choose to sell as bulk, rests with them, and them only.

It is possible, of course, to have sub-industries—syrup mixing is one of these—in which the end process is not wholly in the hands of the wet millers. This sub-industry may, however, be treated as separate, and the proportion of it in the defendants' hands compared with the total bulk. That should not be confused with the question of the control of the raw material itself.

It may, perhaps, be questioned whether control of an industry would not be better gauged by the relative producing efficiency of the combination and the independents. If that were done, however, there would have to be figured in some co-efficient of efficiency for each, which would be impracticable. The proportion of actual production really shows the resultant of those two factors as well as anything can which is not fanciful. I have, it is true, considered the total producing capacity of Corn Products Refining Company later, but that is for the limited purpose of showing its power to drive down prices. I do not regard that capacity as an index of its permanent occupation of the field; rather I regard it as an index of the capacity for that kind of trade warfare in which Corn Products Refining Company was so much engaged.

VIII. EFFORTS OF THE CORN PRODUCTS REFINING COMPANY TO MAINTAIN THEIR ORIGINAL MONOPOLY OF THE INDUSTRY.

As already appears, the combination of 1906 was avowedly for the purpose of terminating a competition theretofore existing. The industry had already experienced at least three such situations before, in 1890, 1897, and 1902, and in each case a combination had been effected for the same pur-

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pose—to prevent what the parties called a destructive and unfair competition. The fact in each case seems to have been that the industry had developed a supply greater than the market would absorb at any prices which permitted a living profit, and whether or no they may have deliberately contemplated a termination of that over-production it was a necessary and inevitable result that this should take place, because it was the only means by which the conditions could be avoided which all sought to avoid. After the combination had been completed, those plants were closed which were the feeblest economically—the Chicago and the two Waukegan plants—and the remaining were either refitted altogether [978] or brought to a higher efficiency; but, as I shall show later, I do not think that the purpose in either case was to limit production.

The combination of 1906 would certainly have continued effective to monopolize the trade had it not been for the growth of the independents already mentioned in the heading just preceding. Yet the Corn Products Refining Company was the first in the field, and for a period of a year or more it had that field alone. The contention of the Government, which I think is amply proven by a variety of considerations which I will afterwards discuss, is that the officers of the Corn Products Refining Company made every effort to maintain the monopoly with which they started; and the contention of the defendants, which it seems to me is equally well proved, is that, regardless of what their efforts may have been, in fact the conditions of the industry were such that they could not do so, but have been slipping back proportionately from the very outset.

In the following sub-headings, the devices adopted by the defendants to continue the control are taken up seriatim, but at the outset it will be clearer to comment upon a certain part of the evidence which is unusual. Ordinarily the intent, which plays so large a part in the decisions of the court in cases of this sort, must be gathered alone from the conduct of the defendants themselves; but in this case, by an unusual chance, the evidence goes much further. The officers of the Corn Products Refining Company apparently had a custom

of communicating with each other by typewritten, unsigned memoranda. Apparently it was often difficult for them to interview each other personally, and the affairs of the company were discussed between them by means of these memoranda with the utmost frankness. The documents were never intended to meet the eyes of any one but the officers themselves, and were, as it were, cinematographic photographs of their purposes at the time when they were written. They have, therefore, the highest validity as evidence of intention, and, although in many instances Bedford attempted to contradict them, his contradiction only served to affect the general credibility of his testimony. In the face of these memoranda, which for some strange reason were preserved, there can be no question in my mind of the continuous and deliberate purpose of the Corn Products Refining Company, by every device which their ingenuity could discover, to maintain as completely as possible their original domination of the industry. That they recognized the impossibility of an absolute exclusion of other glucose and starch manufacturers is true enough, for they were minutely advised as to all conditions of the industry. But, while recognizing this inability, they in no wise conceded among themselves that their conduct could not have, and should not have, a depressing influence upon the growth of any competition. In considering the various devices adopted for that purpose, I shall paraphrase the memoranda in detail; but at the outset it is important to remember that permeating the whole of their conduct, certainly down to the year 1912, there runs the intent which I have mentioned, an intent the execution of which it is the precise purpose of the Anti-Trust Act to foil.

1. THE PROFIT-SHARING PLAN.

[979] [2] On November 12, 1906, after the combination had been some 8 months in existence, the defendants announced their so-called "profit-sharing plan." This applied only to glucose and grape sugar, in which, as already appears, the defendants' monopoly was at that time most nearly absolute. They agreed to set aside out of the profits from

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the sale of glucose and grape sugar 10 cents on each 100 pounds (with some exceptions) purchased by a consumer from July 1 to December 31, 1906. This amount was, however, not to be paid to the consumer until the end of the year 1907, and then was to be payable only in case the customer had purchased glucose and grape sugar of no other producer than itself. This policy was continued through 1906, 1907, 1908, and 1909, and was abandoned at the end of the year 1909; the profits for that year, however, not becoming due until the end of the year 1910. The profit varied, beginning at 10 cents, and afterwards varying between 15 and 5 cents; the last figure, however, being announced only. That such a contract was not inherently illegal is undoubtedly the fact, for it was so expressly decided by the Supreme Court in the case of *Wilder Manufacturing Co.* v. *Corn Products Refining Co.*, 236 U. S. 165, 35 Sup. Ct. 398, 59 L. Ed. 520, Ann. Cas. 1916A, 118. But there is no warrant in the opinion for supposing that it was a permissible method of trade when a part of a general scheme of monopolization. That is the question which this case presents.

The National Candy Company was about to start its glucose plant at Clinton and, in fact, got it under way in April, 1907. It was the first glucose company outside of the combination which showed its head. The Western Glucose Company was organized in 1906 at Roby, Ind., likewise for the purpose of competition in glucose. In fact, it too did not get under way until 1908, owing to the panic of 1907; but the enterprise was known to Bedford during the year 1906. The Union Starch & Refining Company, a small corporation organized before 1906, began to put in a glucose plant early in 1906 and started running in December of that year. There was, therefore, known competition springing up in the glucose business, and it was quite obvious that, if large sales could be made during the year 1906 or the early part of 1907, before the new plants began to sell, the accrued profits might be a substantial way of hampering these at the outset. That this was in fact the purpose of the defendants admits of no conceivable doubt. Smith, a director, writes to Bedford on April 10, 1907, that

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"the profit-sharing plan is the best scheme ever devised in the way of limiting the output of competitors and making it difficult for them to sell." He adds that if they were to have a war it should be to the finish. Walden, on April 27, 1908, writes to his brokers, Johnson and others, that if they lost a customer the competitor must pay for him what the defendants would have had to pay (in profits) to retain him. The purpose of the parties is particularly indicated in the correspondence early in July of 1909, when they were actively discussing the value [980] of the device, and the wisdom of continuing it after that year. Bedford, on July 9, 1909, wrote to his son that the profit sharing was a wall the competitors felt that they could not get over; that without it they would have made very much more money and would have been much larger manufacturers than they were at that time; that some of them had said the Corn Products Refining Company had built a Chinese wall against competitors and kept them in chains. On the same day he wrote again to his son that the scheme created expenses and difficulties to the seller of glucose that the starch manufacturer did not have.

Bedford's own testimony on the trial was that the purpose of the plan was only to prevent small manufacturers in dull seasons from selling the defendants' own regular customers and offering his surplus to other customers at a trifle under the regular price. In view of the expressions in the memoranda, this understanding of the plan must be rejected.

The plan undoubtedly had a deterrent effect upon the trade and was thought by many competitors to be unfair. Peckham, the president of the Clinton Company, swore that, had he known it, he would not have gone into the business. Hughes, the vice president of the Union Starch & Refining Company, found the trade tied up and hard to get business from. The American Maize Products Company, the successor to the Western Glucose Company, which began to do business about May, 1908, was much hampered by it. Edinburg swears that in July, 1909, the plan made it difficult for competitors to get business. Numerous cus-

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tomers were likewise called, who swore that the plan kept them from buying from independents.

2. THE TRANSACTION WITH THE AMERICAN MAIZE PRODUCTS COMPANY AND STEIN, HIRSH & CO.

As already stated, the Western Glucose Company had begun to erect a plant in July, 1906, but for financial reasons was compelled to stop until it was taken over in February, 1908, by the Royal Baking Powder Company, and its name changed to the American Maize Products Company. The contention of the Government is that by the threat of entering into the baking powder business the Corn Products Refining Company first contracted under a false name, "J. B. Esh," to buy one-half the grind of the new company, of which one-half it sold the part that came as glucose at ruinous prices to break down competition, through Stein, Hirsh & Co.; and, second, that as soon as the new company got well under way the combination compelled a reduction of its grind to one-half its full amount. The defendants deny any threat or agreement to limit the grind, but admit that they bought half of the glucose output of the American Maize Products Company, which they needed in order to supply their trade for the time being. Bedford's account is that just then the Chicago plant had been dismantled, as was the fact, and that it was necessary to supply a sufficient amount of glucose and starch to take the place of its production. The pure-food laws had just gone into effect, which made it illegal to add a preservative to the glucose, and [981] Bedford says that he soon found the glucose of the American Maize Products Company was inferior in quality. As he must dispose of it in some way, and could not have two prices for glucose, he was obliged to sell through Stein, Hirsh & Co. secretly.

The evidence shows that originally Bedford attempted to buy the Western Glucose Company, but that was before 1908. The purchase of that company by the Royal Baking Powder Company took place under conditions of great secrecy in the spring of 1908. On March 17, 1908, Bedford's son wrote the traffic manager of the Corn Products Refin-

ing Company that they had decided to put up a baking-powder plant at Oswego. Bedford says that they had discussed the making of baking powder as early as 1906 and had had some labels printed; but the coincidence in time of their actual decision to enter this trade, in the light of the other evidence, is significant.

The sales by American Maize Products Company to the Corn Products Refining Company began on May 26, 1908, and ended on December 30, 1909. The total capacity of the company was about 325,000 bushels a month, which was reached in March, 1909, about 10 months after the "J. B. Esh" account appears. At that time, although the company had orders for all that it could grind, the grind was at once cut to substantially one-half its volume, at the direction of Vernon Gray, the assistant treasurer of the American Maize Products Company, to Saenger, who at that time was the manager. The cut continued through the summer of 1909. "J. B. Esh," the fictitious name in which the account was carried, was concededly a cover for the Corn Products Refining Company, whose identity was kept even from the high employés of the company, and in August, 1908, the account was credited with $600 for machinery, at the personal direction of Boselly, the president. The credit implies the sale of $600 of machinery by the Corn Products Refining Company to the Royal Baking Powder Company, and, in my judgment, offers strong corroboration of the assertion that the baking powder venture had been in fact a threat. That this machinery was for manufacturing baking powder is matter of inference, which I do not hesitate to make.

The starch bought by J. B. Esh was delivered to the Corn Products Refining Company, but the glucose was all sold secretly through a firm of brokers, Stein, Hirsh & Co. These brokers refused to give to customers the source of the glucose, except to say that they had large factories situated vaguely in the corn belt. F. T. Bedford directed them with care not to sell to Corn Products Refining Company customers, and their sales were much below the market price, sometimes as much as 30 cents. The defendants repeatedly

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denied their connection with the sales, which had excited the suspicions of the trade. Thus Walden wrote to Gibbs on May 15, 1908, not only denying the sales, but suggesting that the competitors of Corn Products Refining Company were themselves selling under cover. F. T. Bedford wrote Smith on May 25, 1908, advising him that he might say the sales came from "independent manufacturers." Bedford asserted that the glucose was of inferior quality; but, except for his testimony, which I cannot accept, I can find no such evidence. No complaint appears to have been made to the brokers themselves.

[982] The attempted explanation of these unquestioned facts is discredited for many reasons. First, the arrangement with Stein, Hirsh & Co. was made before May 26, 1908, the date of the first delivery to "J. B. Esh." The letters of May 15, 1908, from Walden to Gibbs, of Creel to Smith of May 18, 1909, and of F. T. Bedford to Smith of May 25, 1908, all speak of Stein, Hirsh & Co. At that time Bedford, by his own statement, was buying in good faith and expected glucose of prime quality; it was only after the deliveries were made that it became necessary for him to employ Stein, Hirsh & Co. The position absolutely contradicts the documentary facts. Second, upon finding the glucose bad, Bedford had it in his power, so far as appears, to direct his demand upon starch, because of the flexibility of the American Maize Products Company plant, which out of a total grind of 12,000 bushels could make 10,000 in starch. Yet he bought only about 40 per cent of the actual starch output of the plant and 60 per cent of the glucose. Not only did he, therefore, make no effort to avail himself of the flexibility of the plant, but he did not even do his best with the proportion, as it existed. Yet he swears that he was always anxious to get all the starch that he could. Third, it is quite evident from the later letters what the device had been. In his letter of July 8, 1909, F. T. Bedford, in writing Reichmann about the proposed appointment of another selling agent, said that he would remember the trouble they had had with this (method) and the suspicion and feeling it had engendered. In his letter of even date to his father he is even

more explicit. After showing that a lower sale price by competitors did not necessarily mean a lower net price, he adds that it had cost them money and created a good deal of feeling to put in a third party to sell glucose for them in the effort to make the competitors pay as much to customers as the company did. Bedford conceded that the reference was to Stein, Hirsh & Co., and with that concession there is left no room for ambiguity.

The reasonable conclusion from the whole testimony is this: That the agreement between the American Maize Products Company and the Corn Products Refining Company was for the purpose of limiting the competition of the former—first, by obtaining half its starch and glucose output and selling the glucose secretly in competition only with the independents to injure their business; and, second, by procuring an actual limitation of the grind when the business became too large. The whole device was that known as the "bogus independent"; i. e., a false independent organized for the purpose of fraudulently breaking the market of the actual independents, by selling under conditions with which they cannot compete. It was a means of secret price discrimination.

3. Defendants' Entry into the Candy Business.

(A) Manierre-Yoe.

As already stated, the Clinton Sugar Refining Company, a subsidiary of the National Candy Company, began grinding corn in April, 1907. The original capacity of the plant was 5,000 bushels, of which the National Candy Company itself consumed about one-third. In 1906 Bedford had an interview with Kersting, the gen[983]eral manager of the Clinton Company, and told him that he was violating his old contract with Warner, which forbade his entering the business. Walden met Peckham, the president, in that year, and suggested that his plan for reconstruction might yet be stopped before completion.

These preliminaries did not stop the erection of the plant, and in the autumn of 1907 the Corn Products Refining Company bought out an old syrup company called the Manierre-

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Yoe Syrup Company, which had been in existence since 1898. Manierre, the president of the company, who certainly was bought out under pressure, at the request of the Corn Products Refining Company remained as president and agreed not to mention the fact that the business had been sold to them. In 1908 the Manierre-Yoe Syrup Company began for the first time to manufacture certain grades of candy, such as gumdrops, made largely of glucose. The identity of the purchaser becoming suspected, there was in February of 1909 an interview at which were present Bedford, Hoops, and Peckham, the president of the National Candy Company. At this interview nothing definite was settled, but each party assumed a somewhat threatening posture toward the other, and later another meeting took place between Bedford, Walden, and Peckham. At that time Bedford said that Peckham had promised not to increase his plant, to which Peckham answered that, while he had said this, yet, if the Corn Products Refining Company went into the candy business, he would increase his own glucose plant. Bedford answered falsely that he was not in the candy business, though he had long since bought and was using the Manierre-Yoe Company as a "fighting proposition." Before this meeting Bedford had asked Hoops, who arranged the interview, to induce Peckham not to increase his own grind, and Peckham had told Hoops his terms as he repeated them to Bedford.

Meanwhile the Corn Products Refining Company was using its ownership of the Manierre-Yoe Syrup Company secretly to compete at cost or less; the proof is to be found in the correspondence. On May 26, 1908, Bedford wrote Smith that the gumdrops which were being put out by the Manierre-Yoe Company should be sold at cost, since they were a "fighting proposition"—a direction which F. T. Bedford and Smith proceeded to put into execution. On May 4, 1909, Morton wrote to Bedford that they should go into the candy business to regulate prices sufficiently to deter ambitious candy manufacturers from engaging in the glucose business; that this would be the best protection to the Corn Products Refining Company; that they could meet

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this competition better on candy than on confectioner's glucose; and that, unless the Clinton factory was disposed to go out of business and close up, he would be in favor of going into the candy traffic and staying there. This letter was certainly written to be shown to Hoops, and was in fact sent by Hoops to the National Candy Company. The only reasonable explanation is that it was of a piece with the interviews which were going on during the spring of 1909. It can have no other interpretation than a threat, with the purpose of compelling the Clinton Company either to close up its business or to limit its supply. Yet on July 13, 1909, [984] Bedford wrote Hoops, on receiving a price list of the Manierre-Yoe Company, that it was the first time he had ever seen or heard of it. His letter reads as though the company was one of which he heard by information only, and is a deceitful attempt to make Hoops suppose that he had nothing to do with its competition. Following this letter, Hoops says that Bedford denied that he had any ownership of the Manierre-Yoe Company, when directly challenged. It was impossible for Hoops to put any other interpretation upon the letter without implying that Bedford was deliberately intending to mislead him.

(B) THE NOVELTY CANDY COMPANY.

Bedford called together the candy makers twice in conference, once in July, 1909, and later at Chicago. At each of these meetings Bedford told them that the defendants were losing a part of their trade in glucose, owing to the competition of the Clinton Company, and that he wished them to buy more of him. Otherwise, he said he would be forced himself to go into the candy business.

These conferences apparently did not have the desired result of securing to the Corn Products Refining Company so much of the candy business as they thought should be theirs, and the Novelty Candy Company was purchased in January, 1910, with three old candy plants at Jersey City, Pittsburgh, and Memphis, to which was joined the Manierre-Yoe Company, purchased nearly three years earlier. All of these factories Bedford described at the trial as junk and

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excused his purchase of them because of the defendants' ignorance of the candy business. It is quite certain that for the years 1910 and 1911 they ran jointly at a loss, and in the year 1912 the loss of the whole Novelty Candy Company amounted to over $100,000, counting the liquidation of the Pittsburgh plant, which caused a loss of $48,000. The Manierre-Yoe Company was generally operated at a profit and has so continued to the present time. At times the Jersey City plant has shown a profit, but the total candy business had always been at a book-keeping loss, at least till 1914.

That this loss was due to the low price at which the product was sold many candy makers believed, though, taken alone, their testimony would not be convincing. Some of the manufacturers complained that they were driven out of business; some said they had nothing to complain of. The conclusion of competitors that a competition they have been unable to bear is necessarily below cost is by no means compelling evidence, at least when it is as little unanimous as this, yet the composite of all the proof here leaves little doubt. The method of the defendants' entry into the field, their purchase of useless plants, which they operated at a loss, their avowed cost prices when first operating the Manierre-Yoe Company, and Bedford's confessed policy of selling such products at cost (his letter to F. T. Bedford of March 28, 1910), their double-dealing, their efforts to exclude or restrict the Clinton Company, the covert threats to candy makers, not only at the conferences, but more openly in the Joy Morton letter above quoted, and the last passage of Bedford's letter to Hoops of July 13, 1909—all these together make it so inherently prob[985]able that they did put into effect ruinous prices as to justify such a conclusion. Their excuse that they were deceived in the purchase of the Novelty Candy Company overtaxes my credulity. They were experienced men of affairs, in constant touch with the candy trade, well able to go outside for sound advice, if they did not have it within their own numbers. Quite another purpose fits much more easily into the frame, and that purpose I find that they entertained.

IX. UNREASONABLE PRICES AND MANIPULATION OF PRICES.

The profit-sharing plan ceased at the end of 1909, although its results necessarily endured for another year, as the consumer could not get its retained profit unless he dealt exclusively with the Corn Products Refining Company during 1910. The position of the Government is that by a preconcerted effort the defendants in the years 1910–1911 attempted to drive down the price of the main products, starch and glucose, to such a point that the independents could not live, meanwhile making up the profits necessary for their own dividends by the sale of their package starches, grape sugar, and their other specialties. The defendants assert that the decline in price, which all concede took place in the years 1910–1911, was the result of a fall in the price of corn, and that the prices kept pace with corn without any deliberate or concerted action on their part, or indeed without any power by them to control prices, had they desired to do so.

1. THE SO-CALLED LOW-PRICE CAMPAIGN OF 1910 AND 1911.

(A) OUTLINE OF THE PLAN.

That the defendants contemplated just such a maneuver and supposed themselves capable of carrying it out, their private correspondence abundantly proves. The effort appears first in Walden's letter to Bedford of July 1, 1909, in which he says that they have capacity to supply all of the glucose trade, and are, in fact, only supplying 60 per cent. What he proposes is to make that portion which they do not control feel the force of their competition, which cannot be done under the profit-sharing plan. This depends chiefly upon the company's ability to produce its products at a minimum, which must be done by an increase of output and an abandonment of the profit-sharing plan. His proposal was that the profit-sharing plan be declared off, and, to quote his lively language, "then open the sluice valves and force our competitors' hands during the most effective season of the year—the fall and winter months. Quick action of this kind would most assuredly deter any of those

who now contemplate building glucose factories." Bedford's marginal notes upon this letter are instructive. They are as follows: "Make them sell at a loss." "Yes. By making a loss."

Bedford answered this letter on July 12, saying that the principal object of making a larger profit sharing is to effect a low price for next year:

> "In this letter you say they have 40 per cent. Good—that is the place to make a low price. In this memo you also state that their sales for this year were so low that the price of corn would make them of little or no profit—good. Then, we do not need to make our reduction until next year."

[986] On July 7 Bedford wrote to Walden as an alternative of a contract arrangement with the confectioners that they must consider making their price low, commencing on the 1st of January. His plan was to keep the price fairly good for January until the competitors had conceded 10 cents for profit-sharing, then they were to make competition, and the more the competitors sold at a loss the better the ultimate result for them. On the same day Walden answered Bedford that, if the primary object was to sell during the next year at unprofitable prices, he would begin in the autumn, as more injury could be done than in the first six months after January 1; he would put a ruinous price in force on September 1, which would force the competitors to make a concession on contracts already entered into, "thereby robbing them of the opportunity to obtain profitable deliveries on low-priced corn conditions the balance of the year."

On July 8 F. T. Bedford wrote to his father suggesting 5 cents profit-sharing and a 10-cent profit on 100 pounds, which would make the business done by the competitors unprofitable. Whether the 10 cents profit would pay 5 cents on the preferred stock would depend, says he, entirely upon the profit made on the other products. It was equivalent to not over 4 cents a bushel, and out of the 14,000,000 bushels ground in the glucose would give a return of only $560,000. It would be necessary, therefore, on the 11,000,000 bushels which remained to make a profit considerably more than the

profit on glucose. He was certain, however, that 10 cents profit, with 5 cents profit-sharing, would make the business very unprofitable to competitors. As to his father's suggestion that they take it out of this year's earnings, because they would make more this year than next, it was itself a good argument for terminating the profit-sharing now, so as to bring about the low-price condition partially in this year and partially in the next. Bedford answered on July 9, in the letter already quoted, showing how much of an impediment the profit-sharing had been to glucose makers and how good in comparison had been the starch makers' profits which Joy Morton had seen. This memorandum he inclosed to Walden on the same day with a letter, saying that they agreed that any scheme which obliged the customers to sell at much lower prices than their own, as the profit-sharing did, had been a great servant to the company. He was doubtful about changing it at that time, but next year was to be some one's "Waterloo." In another memorandum to Walden, of July 12, 1909, perhaps also in reply to Walden's of July 1, he suggests the possibility of making out of the profits for 1909 a reduction of 10 cents a hundred and so inducing the competitors to commit themselves to their customers, and thereafter to reduce the prices so that their proportion of the business should be very unprofitable:

> "If they fail to keep their agreements with the trade, it, of course, would come back to us, and we might get 100 per cent."

In that event the competitors would go to the mixers, and the Corn Products Refining Company would have to make the syrup prices relative to what they sold glucose at. He asks for possible prices at [987] which to sell syrups so that the glucose price to the mixers would still be low.

Walden answered on the 15th of July, suggesting that after their many talks his conclusion was that the best results would be to set the level of their prices in December and January at such a point as to lure on the competitors toward foolish contracts, by reasonably high prices inducing them to make contracts to such an extent even as to encroach upon their own part of the trade, warning the trade to secure from the competitors agreements to guarantee

against Corn Products Refining Company prices. "Then," he says, "having got them to secure as much as possible, let the Corn Products Refining Company set in to make it unprofitable to the competitors." Before entering on such a campaign, and to avoid the possibility of their competitors being driven from the confectionery trade to other lines, he would suggest that contracts be entered into with the mixing, tanning, and other trades to secure those. After the time arrived when competitors had contracted practically all they could arrange to handle, then they could open their "sluice valve."

This correspondence was all six months in advance, and prices actually remained high into November. On November 4, 1909, Walden wrote Bedford that the most important thing was the danger of their competitors making contracts for the ensuing year at to-day's high level. Bedford had obviously suggested to him a cut in price of some 50 points in a day against that possibility—a possibility which had been actual in the previous year. He warns Bedford against such a sudden drop in prices. A decline of 10 points a day would be more reasonable; a reduction of 25 or 50 points would shock the trade. He believed that they could prevent any of the competitors from making any profitable contracts for next year, but the prime condition was to prevent them from taking advantage of the present high profits; that to him was a most important item to consider. The price, in fact, began to drop at once. On November 15 it was $1.95; it had dropped 10 cents in the next week, though by January 14 it had risen again. It continued dropping for a whole year until on January 10, 1911, it had reached $1.25, 70 cents less than at the time the letter was written.

In 1910 certain of the correspondence shows that the parties understood they were carrying out the policy outlined in the foregoing. Walden wrote to his brokers on February 19, 1910, that "the policy of Corn Products Refining Company adopted about a month ago was to sell goods for the coming year at a very close margin," by which policy he believed that, with their own low cost of manufacture, he could force the competitors to "cry quits." It was their

intention to adhere strictly to the policy and to produce the result which they were assured would be successful. The buyer who remained in the open market and took advantage of daily conditions would undoubtedly reap the best benefit. The most dangerous kind of contract for a competitor to make was to guarantee against their own prices, for if they made enough, and the Corn Products Refining Company saw fit to drive the price down lower, it would be 5 cents worse for them than for that company. By this 5 cents he referred to the fact that [988] the competitors, in order to sell to their customers, must still pay the accrued profits for the year 1909, which were not due until the end of 1910.

Bedford, in the letter to his son of March 28, 1910, declares his policy. It was to subordinate all profits and to use all their energies to increasing the grind. No thought of profits even in specialties at first should come in, which in any possible way might interfere with the greatest volume of business. Candy without profit, syrup without profit, jam and jelly without profit—all to increase or maintain the volume of business. Profits, if need were, should go to 8, if necessary to 5, cents a bushel, and if that did not serve to retain their position the prices should go practically to cost, making up by getting good prices in good seasons.

There could hardly be a more unequivocal statement of policy than this, or one which better fitted the plan as the Government asserts it.

(B) EXECUTION OF THE PLAN.

How far the defendants have succeeded in executing the plan suggested in the correspondence cannot be absolutely proved, but I am disposed to think the evidence convincing that they actually did succeed, just as they had proposed. The matter is somewhat complicated by several factors: First, that the price of corn began to go down in June of 1909 until April of the next year. From then until the 1st of September it rose, but fell again, until on February 1 it had reached only 25 cents a bushel. (The price of corn is throughout figured after deducting the sale price of the by-products, and the prices are therefore, of course, con-

ventional. Both parties accept this method for convenience.) From then until November 1, 1911, it rose, and continued with variations at between 50 and 55 cents until the end of 1912, when it fell again to less than 30 cents. It is perfectly true, as the defendants assert, that the price of both glucose and pearl starch varied generally with that of corn. The chart put in evidence by the defendants shows that after the middle of the year 1908, when competition had become effective, the prices had a general correspondence; but a closer examination shows, I think, that there was a very large drop in net profits, just as the defendants proposed. We may begin with gross profits, by which I mean the difference between the price of corn (the value of by-products being deducted) and the price of glucose and starch. This difference is called the "spread." For glucose the average gross profits for the year 1908 had been 38 cents, and for 1909, 33; in 1910 it dropped to 27 cents, and in 1911 to 25 cents; it rose in 1912 to 31 cents, again in 1913 to 32 cents; 1914 is not a fair test, owing to the war.

Similarly, in the case of starch the gross profits fell from 29 cents in 1908 and 23 cents in 1909 to 18 cents in 1910 and 15 cents in 1911. In 1912 it rose to 20, and to 21 cents in 1913. The lowest figures in each case were, therefore, reached in 1910 and 1911, the period during which the campaign was to be carried on as planned in the letters already mentioned. It should be remembered that this gross profit by no means shows the full proportional fall in prices for competitive purposes, because out of it must come cost of production, and [989] this, so far as appears in the testimony, was constant. If, for illustration, we suppose a profit of 10 cents a bushel on glucose and 8 on starch in the year 1909, we should have a manufacturing cost of 23 cents and 15 cents, respectively. We should find the net profits on glucose to be 10, 4, and 2 cents for the years 1909, 1910, and 1911, indicating a cut in earnings of 60 per cent and 80 per cent. In starch the figures would be 8, 3, and nothing, an even more radical cut. If we supposed even that net profits were 50 per cent of gross in 1909, the figures would still be 16½, 10½, and 8½ for glucose, and 10, 6, and

5 for starch. The last figures certainly presuppose too much net profit in 1909, yet they show a decrease of 50 per cent in net earnings. The earlier figures are probably not too low for net profits, at least on glucose. All this assumes a fixed cost of production, and no suggestion is made of any improvement in technique during the period. We may be sure that such evidence would be forthcoming, if it existed, because the proof lay easily within the defendants' power to produce. Nor can we suppose that the first unit of Argo which opened on March 28, 1910, affected the cost, since it is uniformly stated that a plant of 10,000 or 15,000 has full economic efficiency.

The subsequent rise of prices in 1912 and 1913 may have been due to the change in the differential between grape sugar and glucose, or to the investigation preceding this suit. I think the causes of this rise too uncertain and speculative to justify any finding.

(C) SALES BELOW COST.

The Government in further proof of the execution of the low-price campaign asserts that the defendant was actually selling glucose at less than cost during portions of the year 1911. That they were for some time selling "Karo" syrup at less than cost above glucose is abundantly shown, and will be considered when I come to the syrup-mixing business. The contention regarding glucose rests on some tables sent by F. T. Bedford to his father in May, 1912, designed to show the cost of "Karo." These tables are figured upon the price which the glucose that went into "Karo" would have brought upon the market, and were the subject of a long and complicated controversy at the trial. The tables show the price at which glucose was billed to the syrup-mixing house, which was in all cases somewhat less than the price at which it sold in tanks, the difference being designed apparently to represent the selling cost. In order to get the profits on the glucose included in the "Karo" sales, the cost of manufacturing the glucose which was shown on the tables was subtracted from the price at which it was billed to the syrup house, and the resulting difference was stated in cents profit

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per pound. In certain instances this profit appears as a loss. For example, in April and May of 1911 the sales touched their lowest point, showing either a loss or only 1 cent profit per 100 pounds, and it is upon these instances that the Government relies to prove its position. Similar tables were made for "White Flake" syrup and for the standard syrups of the defendants, which show either losses or negligible profits for the same months.

Moffett attempted to explain away the effect of this proof as fol[990]lows: He said that the tables in the column containing the selling prices showed, not the price of glucose at the time of delivery, but at the time when the order came to the syrup house. These orders were for deliveries at 20 or 30 days, and as corn was always bought against the orders, so as to insure the profit, the price of glucose at that time was at once charged against the order. Yet the manufacturing cost was figured in the month in which the glucose was made.

Moffett was mistaken in his recollection of the plan upon which these tables were prepared. First, his May vouchers corroborate the Government's position rather than his own, for they show the price of May deliveries as $1.20½, and the tables show them at $1.20. Second, if he is right, the prices of these May deliveries should figure opposite the June syrup deliveries, if the syrup deliveries were at 20 or 30 days, and were at once charged with the price of glucose when the order was made. The June deliveries were therefore being ordered in May. Now the June deliveries were charged with glucose, not at $1.20½, but $1.35, which is much further from the May entry than $1.20½. The vouchers strongly corroborate the Government's interpretation.

Yet, if he were right, the proof would still be that glucose was sold at a loss, or substantially at cost, because, in order to find the profit and loss on glucose under Moffett's contention, it would be substantially correct to compare the cost of glucose in one month with the price at which it is entered in the succeeding month, in the price column, since the price in the succeeding month indicates the average of delivery prices 20 or 30 days earlier, as has already been said. When the market began to rise, in some instances, under this inter-

pretation, the defendants sold glucose at a loss. Take, for example, the cost of glucose for blue "Karo" in August, 1910, which was $1.38. The price of glucose for blue "Karo" in the succeeding month, September, 1910, was $1.35. If $1.35 indicates the average selling prices 20 and 30 days earlier than September, then in August the defendants were selling it at a loss of 3 cents. Again, take the price of glucose for blue and red "Karo" in September, 1910, which was $1.28 and $1.32, respectively. The selling price in October was $1.20 and $1.28, respectively, showing a loss in each case, if the price column represents current prices 20 and 30 days earlier than October. In the month of January, 1911, glucose for "White Flake" cost $1.02; the price in February was $1, showing a loss in sale of 2 cents per 100 pounds. The cost of glucose for standard syrups in August, 1910, was $1.38, exactly the price charged against the syrup house in September, 1910. Again, the cost of that glucose in September, 1910, was $1.28, exactly the price charged the syrup house in October, 1910.

(D) PROFITS FROM SPECIALTIES.

The Government also seeks to show the low prices of the year 1910 by deducting the known profits from specialties for the year from the profits for the whole year. The remaining sum they divide by the number of bushels ground, and so get the net profit per bushel. Much of this calculation seems to me to be too speculative for safe inference, but I think there are some kindred facts which corroborate [991] the conclusion that the profits for the year were very low. We know the profits upon the sale of standard syrups and "White Flake," because they are contained in F. T. Bedford's tables of May, 1912. We also know the number of pounds of grape sugar made, and that the differential between grape sugar was 14 cents, with no added expense. Indeed, if we were to accept Edinburg's testimony, we should have to make the differential 24 cents, as he considers the price of the barrel 10 cents cheaper; but that element I omit. The profits on the syrups were $522,626.01, and the total differential over glucose on the grape sugar,

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$226,917.48, making a total of $749,543.49. The total profits for the year 1910 were $2,102,611.45, leaving a residual profit of $1,353,067.96 to be accounted for by the total grind, less the amount which went in to make syrups. The total grind was 36,203,652 bushels, and that going into the mixed syrups other than "Karo" 4,556,916 bushels, leaving 31,646,739 for the glucose, grape sugar, and starch. If we divide this into the residual profits, we get a profit of about 4¼ cents a bushel. It should be remembered, however, that a substantial amount of this grind was sold as Kingsford's starch and thin boiling starch, and I think it quite safe to estimate that the profit per grind on the staples for that year was not 4 cents a bushel. This was much lower than the usual profit in the trade. In Bedford's letter to his son of March 28, 1910, already twice quoted, he speaks of 5 cents as a low profit, even during a trade war, and in F. T. Bedford's letter to his father of July 8, 1909, he says that the proposed profit of 10 cents on glucose would be equivalent to only 4 cents a bushel, a return so small as must be made up for in specialties. The calculation seems to me added proof of the low-price campaign based upon unquestionable evidence. I believe that the profits were lower, perhaps even as low as 2.07 cents; but I only find that it was no higher than 4 cents a bushel, and that this was lower than a fair profit.

It should be observed that, under the calculation as I have figured it, it is proper to include in the number of bushels to be divided into the residual net profits the bushels used for grape sugar, since the differential subtracted for grape sugar was the profit over the profit on glucose, and that all grape sugar made the profit on glucose as well as its own differential.

(E) THE JUDGMENT OF THE TRADE.

That the trade supposed the prices to have been cut appears from the evidence of the witnesses, who said that prices were uncomfortably low and that they were hard pressed. Peckham, president of the Clinton Company, says that at times prices got below cost, that extremely low prices went into effect after the rebate plan was abandoned, that they continued until 1912, that in 1910 he did business without

any profit, and in 1911 with a very small one. Hughes, of the Union Starch Company, says that little or no money was made in those years. Edinburg, of the American Maize Company, says that in January, April, May, and July of 1910 his books showed a loss, though not for the whole of the year. Hubinger found the Corn Products Refining Company prices very low; his plant was [992] not profitable in the years in question; in some months there was a loss, and in some months a profit; a small profit at the end of the year; 1911 was better. Piel says that the prices were abnormally low, and that it was pretty hard for a man to stay in the business during those years. Douglas says that the prices were lowest in 1911; an audit of his books shows a net profit for the year ending October 31, 1911, of less than $5,000. Several of the witnesses experienced a demand from their customers for a guaranty against Corn Products Refining Company prices, foreshadowed in the correspondence between the officers of the company.

From all these considerations I find that the so-called "low-price campaign" actually went into effect. It does not appear how far the defendants succeeded in their maneuver of inducing their competitors to load up with long contracts, though they did succeed in discouraging them greatly with business, and perhaps this may have led directly to the complaints out of which this proceeding took place. In 1912 the pressure which they exercised upon the trade abated; but, as has already been shown, the defendants came under investigation in the autumn of 1911. How far there is any causal connection between those two events, as I have already said, rests too much upon inference to justify a finding. Yet the connection appears to me to be not wholly without significance.

2. Manipulation of Prices.

Enough has already been shown in the expressions of the defendants to prove that at least they believed they had entire control over the price at which the product should be sold. Walden's letter of November 4, 1909, is a naïve confession of this power. He and Bedford in that correspondence

are discussing whether it would not be better to disguise their power by a reduction which would not be so unheard of as 50 points in one day, which Bedford apparently proposed, making, as he said, "one bite to the cherry." Whatever was in fact their power, the change in prices beginning in November, 1909, suggests strongly that Walden's policy won. Nor is this the only instance, for in the correspondence of July, 1909, in which they are discussing abandoning the profit-sharing, the presupposition upon which the whole discussion takes place is that they may make prices as they wish. It hardly serves any purpose to go over this matter once more in detail; it is so constantly implied in all the correspondence that the letters must be read to obtain their full force. Some letters in 1908 show the same thing. On November 20, 1908, Smith wired F. T. Bedford, speaking of lowering or maintaining prices upon the assumption that it rested with them to do so. F. T. Bedford replied on the same day by a wire which implied the same thing. On December 10, 1908, Walden wired Bedford, one passage of which is as follows:

"I would recommend, first, that we make contracts with the confectionery trade to April at present prices; about a week or so from now force the hands of our competitors on their yearly contract by making a low-price basis for them to work on.

The plan seems to have been put into effect. On December 1, 1908, the "spread" between glucose and corn was 50 cents a bushel; on [993] February 1, 1909, 35 cents. The figures for starch are 43 and 24 cents. In each case the profit-sharing is deducted from the price. I have used Mahana's diagrammatic table, and not Defendants' Exhibit No. 78, which was not actually offered in evidence. No change in technique accounts for this change in the "spread," and Fisher's figures of the loss in corn seem to me irrelevant. Taken in connection with the proposals in the correspondence, there seems to me no reasonable explanation, except that the prices were manipulated for the purposes declared.

In the early years of the combination a mere glance at the Mahana table shows that the corn did not control the prices, but that these were maintained where the defendants chose

to place them, though this absolute control certainly ceased after competition began to be active.

Many of the witnesses called testified that they followed the prices fixed by the defendants, and this is undoubtedly true. The defendants set the prices of the staples of the industry, published them, and the rest of the trade generally followed. A distinction must, however, here be taken between actual control by the leader, and voluntary following by the independents. A producer may still be the largest in the market, and yet be unable to force others to follow his lead. That would depend upon his capacity to fill the larger demand which would arise from his lower prices. If, for example, he was producing nearly up to his capacity, he would be unable with a drop in price to increase more than to that limit, and, indeed, it would be hard to imagine any purpose in lowering his price, for it would result in the economic solecism of two prices in the same market. If, however, the elasticity of the largest producer's capacity of production were so great that he could accommodate it to the increased demand as the price fell, then he has an absolute power to compel all other producers to follow him down when he lowers his prices.

The defendants had the necessary capacity. We may omit the years 1906 and 1907 and take Moffett's table of grind, with a maximum working year of 350 days, which he gives. The defendants' utmost capacity and the yearly grind of the industry are given in the following table:

	Total grind.	Defendants' full capacity.		Total grind.	Defendants' full capacity.
1908	34,774,000	31,500,000	1912	47,542,157	45,500,000
1909	38,861,877	33,775,000	1913	50,340,235	52,150,000
1910	47,887,377	40,775,000	1914	45,801,973	45,150,000
1911	46,084,854	42,000,000	1915	....	46,375,000

[994] From this it appears that the full capacity of the defendants was equal to the whole demand at the prices fixed in 1913 and 1914, to substantially the full demand in 1912, to 85 per cent and 90 per cent of the demand even in the low prices of 1910 and 1911, and to the 90 per cent, in 1908

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and 1909. When it is remembered that their increased capacity in Argo was foreshadowed as early as 1909, it is a safe conclusion that in lowering prices in 1910 they exercised a real economic coercion upon their competitors, and that the very numerous witnesses who said that they dominated prices were speaking more than figuratively.

The Government's figures give a greater grind than those I have given, but I choose the defendants to be on the safe side. I conclude that their implicit assumption throughout their correspondence of a power to manipulate prices was correct, and that this power they exercised for the purpose of harassing competitors.

The power to raise prices is quite different. It depends upon the inducement to the independents at existing prices. After 1907 I think the capacity of the independents was sufficient to prevent raising prices beyond the vague area at which the price became sufficient to induce new capital into the industry. It was not possible indefinitely to raise the price of a commodity which, like this, enjoyed no natural monopoly, and the power to raise prices was limited by that fact.

3. Discrimination in Prices.

The Government alleges that the defendant has discriminated in its prices among customers; but the evidence is very slight, except for the Stein, Hirsh & Co. matter. The methods of selling "Karo" to the eventual consumer admit of favoritism, and it is a reasonable supposition, I think, that some favoritism was practiced. Bedford, in his letter to Walden of August 15, 1911, spoke of the manipulation of weak spots by Mr. Durham's trade method when referring to the "Karo" trade, and his letter to his son of September 12, in the same year, spoke of continuing "deals" in weak places as long as was thought necessary in order to get the volume of the business they were seeking. I can find no evidence of the misuse of the so-called "zone system," a system which in itself is entirely capable of equitable application. Theoretically the consumer on the near side of the zone is discriminated against in favor of him on the far side; but, if the zones are fairly organized and not too large,

and the radial difference from the routing point of places within the same zone is not too great, there seems no objection to the system, and it certainly makes for convenience and economy in practice. In general, I find the evidence too scanty to justify any finding that the defendants have attempted a genuine price discrimination, though they unquestionably had it in their power to do so.

4. Price Manipulation of Grape Sugar.

The defendants continued substantially the sole makers of grape sugar until the end of 1908. During the year 1909 the Union Company made about 4,000,000 pounds, and in 1910 the American Maize Company began, and together they made about 8,000,000 pounds, or [995] 5 per cent of the total supply. In 1911 this had increased to over 10,000,000 pounds, about 6 per cent. Throughout the year 1911 the differential between grape sugar and glucose was 14 cents a hundred in favor of sugar. The expense of manufacture was substantially the same, except for the price of the barrel, which was, perhaps, some 10 cents cheaper for the sugar. The difference of 24 cents, according to Edinburg, of the American Maize Company, proved an attractive inducement to him, and it is obvious that the competition had begun to count by the end of 1911. The production of the American Maize Products Company for January, 1912, was about 1,500,000 pounds, but during that month the differential was cut by the Corn Products Refining Company from 14 cents to 9 cents. There followed an immediate diminution of the production of the American Maize Products Company to 450,000 pounds in February. The differential continued at 9 cents until July of that year, by which time the production of the American Maize Products Company had risen again to a point exceeding that of January. The differential was then cut to less than that of glucose for a few weeks, and then fixed at 4 cents until the middle of October. The production of the American Maize Products Company broke in half, whereupon the differential was restored to 9 cents until December of that year, when a slight differential appeared in favor of sugar. This continued sub-

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stantially through the first half of the year 1914, when the production of the American Maize Products Company was at an average of about 600,000 pounds a month. Edinburg says that the variation of his grape-sugar production depended entirely upon the differential between glucose and sugar; that when he found that differential large he increased his production, and as it fell he reduced his production. I have used the table of Benham & Noyes, which contains the freight differential.

Moffett's explanation of the change in the differential is that they had always thought it cost more to make grape sugar than glucose, and that in 1912 they discovered their mistake. The coincidence between the growth of the competition and the slow change downward of the differential is better reconciled with the more obvious explanation. Moreover, it is very hard for me to believe that persons as skilled in the detailed expenses of production as the defendants should for so many years have been misled as to an operating cost which must have been fairly obvious in itself. Whether they kept, as Edinburg did, any record of their operating cost, does not appear; but it seems to me too much to ask us to accept the explanation suggested. I find that they manipulated the price of grape sugar to meet competition and that they had knowledge of the amount of that competition.

X. EFFORTS TO FIX PRICES AND TO RESTRICT PRODUCTION.

1. STARCH AGREEMENT OF 1906.

In 1906 the Corn Products Refining Company produced only about 63 per cent of the total starch made, and a meeting took place at New Haven between Walden and Reichman, representatives of the Corn [996] Products Refining Company, and Piel and Douglas and Tooker, independents. What took place at this meeting is in dispute under the testimony. Hubinger says that the Corn Products Refining Company was to set the price and the others were to follow. Douglas says that they did not agree to maintain a price, but that it was an informal talk, in which they en-

deavored to maintain each other's prices, which were to be based on Chicago rates. Tooker, the vice president of the Douglas Company, says that there was no agreement to maintain prices, though they discussed the matter generally, and Reichman corroborates him. It was agreed, however, that Reichman, under an assumed name, should write to Hubinger's brother under an assumed name, stating the rates from Chicago, upon which the prices were to be based. Those witnesses who say that no agreement was made insist that this letter was only for the purpose of informing Hubinger of the freight rates. The letter is in evidence, dated November 8, 1906. Some of the matters in it certainly suggest a price agreement. For example, it is stated that on starch guaranteed to comply with the national Food and Drug act the price is to be 15 cents above the price of ordinary pearl starch, a subject having nothing to do with freight rates.

This document seems to bear out the construction placed upon the interview by Douglas and Hubinger, and I believe and find that there was an informal understanding by which the persons at the interview were to maintain the price of starch. There is no evidence as to how long this continued, but I hardly think that it lasted very long.

In connection with this may be noted the correspondence regarding splitting commissions by starch brokers, a practice which Walden endeavored to prevent. This effort was undoubtedly to maintain the defendants' own prices uniform, and was therefore of an entirely different character. That the Corn Products Refining Company should desire not to have varying prices on their own products in the same market was in no sense illegal. Indeed, the opposite practice lends itself readily to that price discrimination which is an easy device for monopoly.

There were several meetings in 1909, both in New York and Chicago, between Bedford and the starch makers. The upshot of these meetings is in considerable dispute. Douglas says that in one of them Bedford directly proposed the joint reduction of grind, but the others refused. Tooker denies that Bedford made any such proposal, and, on the

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contrary, says that he refused a price agreement when it was suggested to him. Reichman bears out Bedford, but he is not a weighty witness. Some time in 1909 Hubinger and Bedford had another private conversation about curing the demoralization of the business, in which Hubinger says that Bedford told him the only way he knew was to restrict the grind. Hubinger suggested a clearing house. Bedford acknowledges that the conversation took place, but denies that at that or any other time he ever suggested restriction of the grind to any one. Taken on the testimony alone, there is hardly sufficient evidence to justify a finding that he did; but his letter to Walden on July 9, 1909, makes the weight of probability in favor [997] of the fact as testified by Hubinger and Douglas, and certainly altogether discredits Bedford's denial. This was one of the letters discussing the termination of the profit sharing, of which a number have already been noticed. In giving his reasons for not announcing the profit sharing at that time, he said that there were several things under consideration, of which he enumerated five. The first was an agreement as to total grind; the third, possibility of going into the candy business. Bedford was necessarily wholly unable to give any explanation for this letter, except the childish one that it might have been a typographical error, or that it might refer to a limitation of his own grind.

On the same day, in his second letter to Walden, which has already been noticed, he was discussing what should be said to the candy makers in relation to the company's righteous resentment at the aggressive attitude of the National Candy Company. He says that their suggestion that the candy makers shall buy of them is very moderate, and does not bring about any aggressive competition with the National Company, because they, the candy makers, were to agree with the National Candy Company to maintain good prices, and that the only reason why the defendants could consider the proposal was that Hoops and Heide guaranteed promises of the National Candy Company to at least a limitation of their glucose business, which was a matter, however, of which, perhaps, they could not talk, because it might

be illegal. Bedford admitted that Hoops and Heide said that they could get a limitation from the Clinton Company, but insists that he did not entertain the proposal.

There cannot be the least doubt that in 1909 one of the devices which was in the defendants' minds was a limitation of the grind, and this contemporaneous documentary revelation of their purposes to my mind makes it probable that the discussion was of the tenor which Douglas and Hubinger remember. I do not believe that there was any such agreement, because my conclusion is that during that year the defendants decided upon lowering the price by their own low-price campaign.

2. The Suppression of Proposed Companies.

(A) FEDERAL SYRUP REFINING COMPANY.

The Government asserts that Bedford procured the suppression of a proposed glucose company in the autumn of 1912. This rests chiefly upon the testimony of Bertram Orde, a witness hostile to the defendants. He had organized a syndicate for the erection of a new company, and had procured an option on the Douglas plant at Cedar Rapids. Among others, they invited Smith, a director of the Corn Products Refining Company, to join them, and he was thus informed of their steps. At one time they had secured subscriptions of about $1,250,000. Smith told Orde that Bedford was worried over the prospect of the plant, and was doing all he could to prevent its building, and to influence the syndicate against it. The syndicate, in fact, dropped the matter in the middle of December, 1912. Bedford denied taking any such steps; but Smith was not called, a circumstance of [998] weight. The Government's position is that Bedford induced Meyer, who was to be a substantial subscriber, to change his attitude, and the defendants' other conduct lends much plausibility to the theory. In support of this the Government produced a letter written by Bedford to Smith on October 28, 1912, in which he says he is pleased to note that Meyer is with them at heart and trusts that his conversion may extend to his managers. It should, because

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"Karo" was going to be the seller on the whole more profitable and easier of sales than any other syrup. This letter refers, I think, to Smith's letter to Bedford of October 25, 1912, in which he said that Hubinger's constant activity had prevented at least two of Meyer's managers from falling in line for "Karo" at "yesterday's meeting"; they wanted to await the next move of Hubinger. I do not believe that this refers to the Federal Syrup Refining Company, and I think the evidence doubtful as to the interference by the defendants with Orde's plans, and decline to make any finding upon that score.

(B) THE STALEY MANUFACTURING COMPANY.

Staley was a packer, who began business in 1898, but bought all his starch of the manufacturers. In November of 1906, having found difficulty in procuring as much starch as he wanted at satisfactory prices, he incorporated his business and considered building a plant, and in March, 1907, Walden wrote him a letter, offering him certain bulk prices on starch, in consideration of which he was to agree for the term of the contract not to engage in preparing or grinding corn in the manufacture of starch, nor to take any action toward equipping his factory with machinery for that purpose. This proposal Staley did not expressly refuse or accept in his letter of March 18, 1907, and in Walden's answer on March 20 he suggested that his own proposal on starch implied a contract for three years, and not for one year, as he understands Staley to suggest. Staley did not begin until June 1, 1909, when he bought the old Cutsinger Starch Company, which has been discontinued by the National Starch Company. Even then he did not begin to grind until March, 1912, and had to shut down again in June; he began again in September, when he ran until July, 1914, with some interruptions. At that time he closed, but has since that time opened. Walden had advised him that he was undertaking heavy responsibilities, and that he could buy the starch cheaper than to make it, and he seems to have been on the whole somewhat unsuccessful. He believed that the defendants made the prices in the market, but I cannot find any evidence that they

adopted toward him any unfair practices after he got started. Walden's letter was, of course, an attempt to keep him out of the business, and, taken in connection with the general intent shown through the whole of defendants' conduct, was an illegal effort; but I do not find that in its execution there was any unfair practice.

XI. FREIGHT RATES.

(1) EAST-BOUND GLUCOSE RATE.

On September 20, 1905, the barrel rate of glucose from Chicago to New York was 25 cents domestic, and 20 cents export, which it had [999] long been; at the same time, the tank rate was 17½ cents domestic, and 15 cents export. The barrel corn rate from Chicago to New York at the same time was 17½ cents, and Edgewater had a transit privilege to New York of ½ cent; the usual lighterage charges being 3 cents. By "transit privilege" is meant the right to carry the corn to New York from Edgewater at ½ cent per pound after it is made into glucose. The lake and rail rate on corn from Chicago to New York was not fixed at this period, especially as rebates were common; but it probably was not far from 10 cents. The greater part of the corn, which came to New York, came by way of water to Buffalo. Gantt, the traffic manager of the Corn Products Refining Company, testified that probably about 70 per cent of the whole came in that way. On this corn the rate had therefore been in the neighborhood of 11 cents, as against a tank rate for glucose of 17½ cents, a differential of 6½ cents, and a barrel rate of 25 cents, a differential of 14 cents. These were heavy advantages in favor of Edgewater in its New York business.

In 1907 the Union and the Clinton Companies began their manufacture of glucose, being the first competitors, and on May 1, 1907, the railroads advanced their glucose rates to 30 cents domestic and 25 cents export on both barrel and tank, thus increasing the differential on the domestic barrel rate from 14 cents to 19 cents, and on tanks from 6½ to 19 cents. The independents objected to this, and succeeded in getting the railroads to reduce the rates

on September 1, 1907, on both tank and barrel to 25 cents domestic and 22½ cents export. This still left a marked advance in tanks, but restored the barrel rates to about what they had been. On April 15, 1908, Ingalls, the freight traffic manager of the New York Central Lines, and Morgan, the assistant general freight agent of the Nickel Plate Road, wrote to Kersting, of the Clinton Company, that on June 1, 1908, they would make a further compliance with their demands by reducing the rate on both barrels and tanks to 21½ cents domestic and 20 cents export. These reductions never took place, but on April 23 of that year these officers notified Kersting that another hearing would be had. This hearing took place after several adjournments, and the roads declined to make any further changes. Thereupon the independents took the matter to the Interstate Commerce Commission, which held the rates unreasonable (*State of Iowa* v. *A. C. L. R. A.*, 24 I. C. C. 134) and finally fixed the rate for both tanks and barrels at 20 cents domestic and 18 cents export in August, 1912.

By the recent 5 per cent general increase allowed by the Interstate Commerce Commission, the domestic rate was raised to 21 cents and remained until March 1, 1915, when it was advanced again to 25 cents for domestic and 20 cents for export. These increases were justified by the decision of the commission on November 9, 1915—"Glucose from Chicago," 36 I. C. C. 379. In this decision, however, the commission took away the transit in favor of Edgewater, which amounted to 2½ cents. Therefore, if the 5 per cent increase be disregarded, the actual result of the increases made after 1912 amounts to 1½ cents domestic and an actual lowering of the export rate, if the transit formerly applied to it. The basis of the commission's deci-[1000]sion was that, although Edgewater had a genuine advantage through its differential in New York, that advantage did not exist for Boston, Philadelphia, Pittsburgh, Reading, Harrisburg, Rochester, Albany, Buffalo, and Baltimore, because the combination corn rate to Edgewater and the proposed glucose rates to the cities named was in excess of the glucose rate paid by the independents.

These being the undisputed facts, the Government asserts that the changes in rates in 1907 and 1908 were due to the improper intervention and interference of the defendants. The support of this rests altogether in the correspondence. The first rise, as stated, occurred on May 1, 1907, and was known to Ashcraft, the assistant traffic manager, and Tremain, the traffic manager, in March and April of that year. Tremain's letters are not in evidence, but several letters from Ashcraft to him appear, and they show that he was quite aware, as was, of course, inevitable, of the advantage which the increase would give to him in securing a differential in favor of Edgewater. It was a fair inference from the letters of March 31 and April 1, 1907, that the rate had been secured by solicitation to the railroads themselves, and that the motive was in order to check the growing competitors in their eastern business. There is no evidence, however, that this was procured by any corruption of the railroad or its officials. One purpose was to raise the rate on glucose and lower it on syrup, so as to reduce the profit to the syrup mixers. It is to be noted in this connection that the year 1907 was the first in which the defendants entered the syrup-mixing business. The letter of April 3, 1907, corroborates this interpretation, and, like the others, is full of intimations of suppression of and secrecy about the real facts.

The rates established were certainly higher than were justified, and were reduced in September, as already shown. That Ashcraft was aware of the indefensibility of his support of a higher rate than that existing appears in his letter to F. T. Bedford on September 21, 1907. The independents were not satisfied with the rate as lowered, and continued their agitation; the matter was then referred to the Central Freight Association. The railroads were concerned lest the matter be carried to Washington, as Ashcraft wrote F. T. Bedford on February 20, 1908.

The crux of the matter lies in what was done between March and July of 1908; i. e., what was done "in the nature of lobbying," as Ashcraft wrote to F. T. Bedford on March 16, 1908, and what pressure was exercised upon the railroads to maintain the rates and to suffer the matter to go to the

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Interstate Commerce Commission. That there was private access to the presidents of the roads, and that there was pressure of some sort, seems to be unquestioned. The correspondence throughout shows that the defendants were in constant private communication with the railways, and were even supplying them with arguments to use in answering the independents themselves. The traffic managers having decided to reduce the rates, their subsequent change of mind was almost certainly produced by the intermediation of the defendants. On April 21, 1908, after the original decision had been made, Ashcraft wrote to F. T. Bedford that from the efforts made it was apparent what they were to expect if **[1001]** the matter was not taken up with the presidents as he had urged; that, confidentially, he was supported in this advice by the high traffic officials. This, of course, means that he had been in private communication with the high traffic officials of the railroads, and that they had advised him that they were powerless against the importunities of the independents, unless the defendants could take it up with the presidents. From this letter it also appears Bedford had himself talked with some of the officials, in spite of his present denial. The communication between the defendants and the railroad officials also appears from F. T. Bedford's wire to Ashcraft on April 22. On April 23 he wired Ashcraft, suggesting that the Pennsylvania could be induced to take no action if the American Maize Products Company at Roby withdrew their requests, and that Reichman should see Scully with that in mind. Ashcraft answered on the same day that he would see to it, and agreed that the case would be much weakened if Scully should withdraw.

In fact, Scully, who was fighting the existing rate, had a talk with F. T. Bedford, who told him that he wished him to withdraw his objection and let the rates continue. Scully continued, however, to oppose, until he got word from Boselly to withdraw his objection a day or two after. Gardiner, also of the same company, was stopped in his activities and actually withdrawn from a public meeting with the railroad officials. Gray, Boselly's intermediary, was indefinite in

his recollection of the matter, but it certainly took place as stated. The importance of Scully's withdrawal is further shown by the wire of F. T. Bedford to Ashcraft on April 23, 1908, in which he said that Hodgson, of the Pennsylvania, had told him that if Scully withdrew he would have no further interest in it.

My conclusion from this evidence is that the defendants attempted, both in public meetings and by private communication and importunity, to secure the original rise in rates of May, 1907, and to prevent the reduction proposed on April 15, 1908; that in so doing they procured Boselly to withdraw his objection and attempted to get Scully to give a false reason. I believe that this was a part of their arrangement with Boselly in the spring of 1908, by which they should purchase half his grind. I find no evidence, with the exception of the suggestion concerning the Nickel Plate Road, that there were any bribes to the road or to the officials, or any threats used; but I do find that the effort was to continue the differential with the purpose of preventing any competition with Edgewater. I find that at the time the differential gave an undue advantage to Edgewater in supplying New York and its environs, but not elsewhere. I also find that the private solicitation of the railway presidents and supplying the roads with facts which were not known to the independents was an unfair method of competition. It need hardly be added that the methods by which the opposition of the American Maize Products Company was withdrawn was also unfair.

2. Transits.

I find no competent evidence to show that the change of the transits at Clinton were due to the mediation of the defendants, except a [1002] passage in a letter from Ashcraft to F. T. Bedford on January 2, 1908, in which he says that Clinton would be probably deprived of its glucose transits to St. Louis; yet this alone seems hardly sufficient to justify a finding that Ashcraft procured the change. The general policy of the company, stated in Ashcraft's letter of July 2, 1908, to F. T. Bedford, was, however, consonant with that possibility. He there said that

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he was trying to get the roads to believe that it was best for all concerned to take up and consult with him any question of the readjustment and change of rates in his commodity; that they were fast getting to realize that the defendants knew how to be fair in these things, and not to oppose advances on the idea that an advance is against the shipper; that his own idea was that adjustments were frequently more important to them than the rate itself. O'Halloran, moreover, said that Grossclose had told him that Ashcraft wanted the transits withdrawn; but this is hearsay. Disregarding that evidence, there remains a strong antecedent probability that the transits were removed through the instigation of Ashcraft. Yet there is no direct evidence, and in its absence I think the inference not certain enough for a finding. The same considerations apply to the change of transits at Cedar Rapids and Decatur with greater force.

3. Barrel and Tank Rate from Clinton to St. Louis.

By very old adjustment, Clinton was entitled to the same rate on glucose to St. Louis as Chicago. In 1908 the barrel rate was 10 cents and the tank rate 7 cents, while the Clinton rate was 10 cents on both. O'Halloran, of the Clinton Company, wished the railroads to give him a 7-cent rate on tanks, which was done; but shortly thereafter the rate on tanks in both places was raised to 10 cents. I think it reasonable to suppose that this change was procured by Ashcraft, because of the correspondence between him and F. T. Bedford. On January 7 he wrote F. T. Bedford that Clinton was making application for the same rate on tanks and barrels which Chicago enjoyed; that with their plant at Granite City getting into St. Louis on bridge toll, and their plant at Pekin at 6 cents, together with the disability of Chicago, which was then being dismantled, they had no special reason for a tank rate of 7 cents from Chicago. Scully might also go after some of that business. He concludes:

"If Clinton's application for Chicago's rates should be voted down to-day, I believe the same rate could be forced in through proper agitation."

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Bedford agreed to the same rate on barrels and tanks in his answer of January 9, and apparently went to Chicago, not observing, however, Ashcraft's injunction to bring his letter of the 7th with him, which he thought ought not to have remained on their files. I find from this correspondence that the subsequent rise from 7 to 10 cents was done at the instigation, or, as Ashcraft put it, the "agitation," of the defendants—that is, that they exercised at least persuasion over the road to make the rates the same for tanks and barrels. I find that there was no reason for the rise in the rate, and that the defendants' efforts were to prevent competition by Clinton.

XII. THE SYRUP TRADE.

[1003] The general charge in respect of the monopolization of the syrup trade is that the defendants, seeking to control the manufacture of glucose, included those end products which were made from them. Glucose, which for some 8 years has been generally known as corn syrup, enters into the composition of many syrups. The cheapest, and probably the widest used, table syrups of any are those which contain between 85 and 90 per cent of glucose, flavored with 15 or 10 per cent of refiners' sugar. Before the organization of Corn Products Refining Company, the Corn Products Company had put upon the market a syrup under the trade-name "Karo," already referred to, of this class. They had spent a good deal of money advertising it, but it had not obtained more than a place along with other brands. When the Corn Products Refining Company was organized they continued to make "Karo," along with a general business in mixing other brands of their own, and also private brands of such as jobbers might wish. The labels for these brands they printed in large numbers and pasted upon the cans. Mixers also bought large quantities of glucose direct and sold it under their own brand. The position of the Government is that the defendants kept the price of glucose and mixed syrup which they sold on substantially an equality, allowing no differential which would justify the industry of mixing at all; that in this way they gradually drove the

mixers out of business, and then declined to make any more syrups themselves under the private brand. The result of all this was that the whole trade, or substantially the whole trade, remained in their hands under their name "Karo," or under one or two of their standard brands, which they retained.

The defendants at first seem to have enjoyed a substantial monoply in the mixing trade among glucose manufacturers. During the first two years they alone mixed any corn syrup. In 1908 the American Maize Products Company, their only competitor, mixed about 5 per cent of the total syrup mixed by glucose manufacturers; in the next year the Union Company appeared. The American Maize Company discontinued in 1909, and thereafter only the Union Company and the Hubinger Company have mixed. During the years 1912, 1913, and 1914 they have mixed about 12 per cent of the total supply made by the glucose manufacturers.

The defendants urge two objections to this presentation: The first is that it leaves out of account the private mixers; and, second, the competition of corn syrup with the other various syrups—a question which has already been touched on. I am satisfied that the corn syrup proper, by which I mean a syrup containing 80 per cent or more of glucose, is regarded by the consumer as a substantially different article, both by taste and by custom, from those which contain 40 per cent or less. The molasses, sorghum, and cane syrup contain a smaller percentage of glucose, and, although there may be no deceit involved, they are in fact harmlessly adulterated. Of course, I do not suggest that such syrups are illegal or improper as sold.

The corn syrup proper is, and necessarily must be, confessedly a |1004| flavored glucose, and the distinction between the demands seems to me substantial. Of course, these two commodities will, at certain prices, compete with each other; but upon that score I need add nothing to what has been said previously. I think it proper to consider, therefore, the percentage of the supply of corn syrup which the defendants control and their conduct to obtain it.

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1. The Purpose of the Defendants to Control the Syrup Industry.

It was the purpose of the defendants generally to extend the Corn Products Refining Company's control as far as possible into all end products, and among other such to get as large a percentage of the syrup industry as was possible. This appears in several letters, most of them from Bedford, sometimes by way of fatherly advice to his son, drawn from his own prior experience in the Standard Oil Company, which he said had adopted precisely the same policy. Their attitude toward the syrup mixer himself was at one time ambiguous. Thus Smith wrote to Bedford on April 10, 1907, a letter which illustrates the defendants' attitude of mind. He was there urging that the syrup mixers should be protected, and for that reason for himself he preferred to maintain a greater differential between glucose and syrup so as to tie the mixer to the company. If they themselves could make syrup cheaper than the mixer, they should tie him to them with a contract, unless they were determined on a "war of extermination." If they were to have such a war, there ought to be no outstanding contracts to cause embarrassment. As things were, they had already aroused a feeling of resentment among the mixers, and for that reason they might as well try to exterminate them at the same time by adding pure maple syrup and the higher grades of jelly, as well as New Orleans molasses. Yet Smith had his doubts of their success in exterminating either the mixers or any of the new competitors, all of whom were well fortified. He considers in detail the position of these new added companies, and is convinced that they could stand a long fight and keep up a long war. Yet, if there were to be a war, let it be to the finish, not the kind of sporadic war that Matthiessen used to engage in.

This ingenuous discussion was answered by F. T. Bedford, apparently at the direction of his father, on April 12, 1907. The writer inclined against an effort to tie the mixing trade to the company, and doubted the strength of the mixers' position or of the glucose manufacturers'. The inference is that he was for a war to exterminate the mixers.

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This alternative seems to have been accepted, for it is quite clear from Ashcraft's letter to Tremain, March 21, 1907, that the plan was to raise the rate on glucose in part for the purpose of getting it on a parity with syrup, so as to eliminate any profit over glucose and make mixing impossible. Mention of this letter has already been made in the east-bound glucose matter. Wintermann, who had been in the St. Louis Syrup & Preserving Company, which went into the combination of 1906, organized a new company directly thereafter under the same name, and in 1907 Bedford bought the common stock of this company and entered into a contract with it to sell it glucose; [1005] in 1910 he bought the balance of it and closed out the syrup-mixing business. It was at about this time that he wrote his son, on March 28, 1910, of the possible importance of this company as a good ally.

To return to 1908: It appears that by the end of that year the defendants supposed that they were selling to 90 per cent of the trade, and that they contemplated getting part of the other 10 per cent, though they did not expect to get it all. This is in Smith's letter to Bedford of November 20, 1908. Bedford attempted to explain this letter by saying that Smith was referring only to glucose manufacturers who made syrup. But this cannot be so. In 1910 the Union Company alone was making syrup, and making less than 4 per cent at that. Later on in the letter Smith says, "Our largest competitors in mixing line are working on low-price contracts for glucose," which is entirely inconsistent with the idea that the earlier part of the letter refers only to the Union Company. Whether they actually had at that time 90 per cent of the trade may be open to question, but I am discussing only their purpose at this time. On March 29, 1910, Bedford in a letter to Walden recommends doing business, if necessary, without profit on the end products, so as to increase the sales of glucose, instancing the practice of the Standard Oil Company 25 years before, by which eventually petroleum drove out the other oils; that the proper course was to surround their business with the consumption products, syrups, candy, and preserves. They must take the

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mastery in these three specialties, so as to increase the consumption of their primary products. On the next day, in an added memorandum, he spoke of the logical right of the company to command the syrup business, and how the general outcry when they started in had died away; they need only take a firm stand to prove that they might dominate the jam and candy business, as they did the syrup business. That was the psychological moment for a campaign. On March 28, 1910, Bedford wrote his son in the same vein. He thought that all profits should be subordinated to increase the grind; there should be no consideration for profits in the specialties at the outset, which might prevent the greatest possible volume of business. He was in favor of doing the candy, maple syrup, and jam business without profit, even down to the extent of 5 cents a bushel, and, if that would not do, practically at cost.

Later in the year, when the low-price campaign was well on, several letters passed, showing the defendants' purpose. Walden wrote to Bedford on July 5 of that year that the syrup mixer might make specialties like maple and flavored syrups, but that the defendants did the bulk of the business in corn syrup.

About a year later they were discussing withdrawing all brands but "Karo." On July 25, 1911, Walden writes Bedford that, if they are doing 90 per cent of the syrup business as it is, 30 per cent under the "Karo" brand, it would mean, if they withdrew their standard syrups and sold nothing but "Karo," that the cost of advertising "Karo" would go down. There would be more or less of an outcry, he thought, from the jobbers generally; but the outcry would soon fade away if the trade realized they were uniting with them in moving these goods direct to the customer. If "Karo" could be made to |1006| do 90 per cent of the syrup of the country, it would become the name of a class of goods, and not a specialty.

That the defendants in fact sold "Karo" at no profit abundantly appears. This was the whole purport of the letters of F. T. Bedford to his father in May, 1912, together with the tables which have already been discussed

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under the heading "Sales at a loss." Both in the year 1910 and 1911 this was done, even at a period when the profits on glucose itself were very trifling. On October 29, 1912, Bedford, probably relying on these tables, wrote to Smith that he had already told him there was no profit in "Karo," but that, with or without profit, they must have their share of the business. On April 4, 1912, he had written to Smith that it was 100 per cent "Karo," and that as soon as possible. On June 24, 1912, in a letter of advice to his son, he instanced the course of the Standard Oil Company in Australia and South Africa, who got all their business in one brand. On June 30, 1912, F. T. Bedford wrote his father that he did not always advance syrup when they advance glucose, but that the syrup prices always went down with the glucose. Thus, in the month of April of 1912 standard syrups did not make within 1 cent a pound of the profit on glucose, and in the month of May, 11 cents less.

By the 1st of August, 1912, they thought, apparently, that they had excluded all the syrup mixers, for Bedford wrote to his son that they recognized that now the competition was that of the glucose manufacturers. They recognized this policy to be unfair, as appears in the letter of September 30, 1912, from Bedford to Smith, in which he said that they could not have it known and might not talk of it, but that he had been advised by his lawyer that no law compelled them to make the same price to different customers as long as it was done without a contract with others. They might say, if need were, that they did not want parties to handle their syrup to the injury of their business.

In February of 1912, without much warning, Bedford called the jobbers together and announced that he would not sell any more syrup in private brands. His excuse for that at the trial was that the annoyance and expense involved in conducting that part of the business made it much more undesirable than not. But in the face of the correspondence already quoted, I can not accept this as a true explanation. It is perfectly clear that they intended to have their own brands dominate the syrup market as much as possible, that in 1912 they had supposed that they had suc-

ceeded, and that they also anticipated a slow substitution of the single brand "Karo" for their own standard brands. It was a necessary part of this device that they should succeed in eliminating the private brands themselves. This would have left them in that dominant control of the syrup-mixing business, which is what they wanted; it would have left only the glucose manufacturers as their competitors. Whether Bedford's reference in the letter of September 30, 1912, to a discrimination in price was followed up by such discrimination, as I have already said, it is somewhat difficult to tell. The indications from this, and also from the method of selling the "Karo," which was by allowances, called "deals," and by other [1007] means lending themselves to discrimination, strongly suggest to me that, in fact, there was discrimination. The reference of Bedford in his letters as to the manipulation of "weak" places is another corroborative circumstance. I think it extremely probable that throughout this "Karo" campaign there was actual price discrimination exercised wherever it appeared profitable; but in the absence of more specific proof I can make a finding no further than that the defendants showed an entire willingness to do this, and used methods which permitted it.

Such was the plan which they proposed to themselves in getting control of the syrup business, a plan which itself was part of their general policy to secure control of all the end products of the raw materials which they manufactured. It remains to consider how far they were successful.

2. The Execution of the Plan.

We have it on the admission of the defendants that they were trying to lessen the differential between glucose and syrup as early as 1907, and that by 1910 they were selling "Karo" at a loss over glucose. The effect of this was reflected in the distress of their competitors. The Union Company commenced in 1909, and made very little money. They would have made no profit, had they charged the market price of glucose, which seems to indicate that what we know to have been the practice of the defendants in 1910 extended at least to the previous year. The methods of mer-

chandising the syrup also caused them some embarrassment. The zone prices they thought different from the usual way of figuring on Chicago plus freight, and the "deals" established an uncertain element, as well as the window-display allowances. Yet in spite of these handicaps their trade as syrup makers has greatly increased, having nearly trebled from 1909 to 1913.

The American Maize Products Company tried it for one year and then abandoned it, but the Hubinger Company established a substantial business during the years 1912, 1913, and 1914. So much for the mixing done by the glucose makers themselves.

Numbers of witnesses were called, for the most part mixers, who testified that the market was dominated by the Corn Products Refining Company. The use of this word I have already discussed, but under the circumstances of this case, considering the large proportion of the supply in the hands of the defendants, it seems to me to have a relevant significance. Several of them testified that the price of glucose and mixed syrup was either the same or so that they could not compete; in some instances they gave up altogether the sale of the higher percentage glucose syrups. Yet the testimony is by no means uniform. A number of mixers have continued in the business, and seem to find no difficulty in getting their syrup or glucose from other persons, either Scully, or the Union, or the American Maize Company. A tabulation has been prepared by the Government of the percentage of syrups sold by wholesale grocers who testified in the case, amounting to 65 in all. The percentage of syrup bought from the defendants is 71 and from the independents 29. This probably represents as fairly as is accessible the proportion of the high percentage syrups sup[1008]plied to these customers by the Corn Products Refining Company. Some mixers still remain in this part of the business, but the greater number have gradually discontinued, and in many cases they attribute their withdrawal to the appearance and progress of "Karo."

My conclusion is that in this grade of corn syrup the production of the defendants amounts to substantially more

than half, and that their capacity for expansion is sufficient to give them the power to lower the price to such figure as they wish. I find that, except for the maintenance of substantial equality of price between glucose and syrup and the withdrawal of private labels, there were no unfair practices in detail in the marketing of "Karo," with some reservation regarding the uses which may have been made of "deals" and window-display allowances.

A word should be said as to the defendants' tables, which are made up for the year 1912 (Defendants' Exhibit 59-L). I do not accept the percentage of 13 as a fair estimate, because this attempts to lump all the syrups together into one, which, for the reasons already given, does not seem to me to be a reasonable test. The defendants claim that they supplied only 45 per cent of the total trade, based upon a mixture of 85 per cent glucose and 15 per cent flavoring; but this is based upon the assumption that all the glucose sold by the competitors went into syrups, and it is very doubtful whether this be true. F. T. Bedford, in his letter to Smith of April 10, 1907, said that the defendants knew that a great part of the glucose did not go into corn syrup, saying that the mixer put fully half his requirements into goods not competitive with their own. This indicates that the percentage of 45 contained in Mahana's table is erroneous. The Government, accepting F. T. Bedford's word, figures that the defendants made and sold 64 per cent of the glucose syrup in 1912. I deem it impossible to obtain any exact information upon this score, but I think it conservative to estimate that more than half the trade is in the hands of the defendants. The rest of the glucose probably goes into those which contain a smaller percentage.

I find, therefore, that the plan to exclude the mixer from their sub-industry has not succeeded to the extent that the defendants planned, and that as such a sub-industry competition continues to exist and probably will continue.

XIII. DISMANTLING OF PLANTS.

One of the articles in the petition alleges the dismantling of the plants by the defendants. I have already considered

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the dismantling of the plants of the old Corn Products Company. Of those with which the defendants started in 1906, the Chicago and two Waukegan plants have been dismantled, and Davenport, Granite City, and Pekin have been reconstructed, some at large expense. The greatest factory of all, Argo, was not in existence until 1909, and did not begin to manufacture until the spring of 1910. The factory at Pekin was thoroughly reconstructed at an expense of over $1,000,000 and began operations in 1913. At present the factories of the company consist of Argo, Pekin, Edgewater, and Granite City, the latter a syrup-mixing factory. There is also a reserve not ordinarily operated at Davenport, and there is a relatively small starch-producing factory at Kingsford. [1009] In the case of most of the changes, the result has been a higher producing efficiency and a greater concentration of capacity. Moffett's table of grind, already alluded to, indicates on the whole a steady increase in capacity, at least, after the first two years. The Chicago plant, the Government admits, was in no position to be continued, and not only economy, but mere prudence, required its abandonment. I do not believe that the abandonment of the so-called Upper House at Waukegan was with an effort to curtail the grind. This was the old Warner Company plant, and while it was in fair condition in 1906, and was operated through 1913, I believe those witnesses who say that it could not have been rehabilitated to compete on a modern basis at that time without the expenditure of a greater sum of money than was justified economically. The other Waukegan plant, that of the United States Sugar Refining Company, called the Lower House, was only operated one year after the defendants were organized, and the same may be said of it. I find nothing to criticize, therefore, in the abandonment of these plants. The testimony of the letters indicates pretty well that after the first two years the policy of the company had never been toward a restriction of its own grind.

Bedford was actuated throughout with a passion for an increase in size. He seems to have inherited this from his experience with the Standard Oil Company, and to have supposed that only through constantly forcing his produc-

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tion could he obtain that domination which he wished. I believe that he thoroughly understood that any efforts to curtail production and raise prices would be the best means of inducing new capital into the field, and this was the one thing above all others which he wished to avoid. He no doubt knew that, in an industry which enjoyed no legal or natural monopoly, control, in any event, could exist only within narrow limits, and profits could be obtained over a narrow margin. The Government, which rightly relies upon the naive interchange of ideas between the defendants to show their purposes, must be content to accept what makes for them with what makes against, and no one can read this correspondence without observing that there is no desire at any time to limit the grind of the defendants. This seems to me the surest proof that any change of factory equipment was throughout with an eye to manufacturing advantage. Nor can I regard the apparent decrease of capacity dating from 1902 as more than a paper index of actual power. A large number of factories located as chance competition might have dictated might well have an apparent capacity which could not be made real. How far they would have been expanded and modernized, had there been no combinations, it is hard to say. The law of increasing returns operates in the industry up to a grind of 10,000, perhaps up to 15,000, bushels by the unanimous testimony, and many of the old plants had less. Location, especially relative location, must have counted for a great deal, especially when the question was of investing enough more money in a plant, even a large one, to bring its efficiency to modern standards.

I find that the abandonment of the plants since 1906 was without any purpose of limiting production or raising prices.

[1010] XIV. FINDINGS UPON THE ARTICLES ALLEGED IN THE PETITION.

It remains to take up the allegations of the petition as they are set forth in separate articles and to make specific findings in relation to them.

I, II, III. The first three articles of the petition are conceded.

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IV. The fourth article is not disputed, except so far as the purposes of the defendants are alleged. I find that the reorganizations of 1897, 1902, and 1906 were for the purpose of monopolizing and restraining trade in the manufacture of glucose and starch.

V. I find that the defendants have attempted, and are attempting, to monopolize the trade in mixed syrups, consisting of from 85 per cent to 90 per cent glucose and the balance flavoring matter.

VI. I find that the defendants have attempted, and are attempting, to monopolize the trade in glucose and starch and derivatives therefrom.

VII*a*. I find that the consolidations set forth in the petition were made for the purpose of restraining competition in domestic and foreign commerce in starch and glucose and their derivatives.

VII*b*. I find that the dismantling of the plants by the defendants was not for the purpose of monopolizing or restraining trade.

VII*c*. I find that in two instances before mentioned the defendants exacted contracts not to engage in the trade from the owners who sold their plants, and that this was done with the purpose of monopolizing the industry as aforesaid.

VII*d*. I find that the defendants from November, 1906, until January 1, 1910, engaged in a profit-sharing plan as alleged, and that this was part of an attempt to monopolize and restrain commerce as aforesaid.

VII*e*. I find that the defendants guaranteed their prices against decline in many instances, but I make no finding as to the purpose with which this was done.

VII*f*. I find that the defendants attempted by threats to prevent the erection of the American Maize Products Company, and that they subsequently succeeded in restricting the grind of that company by agreement; that in addition they secretly and deceitfully sold at unprofitable prices a part of the product of that company, representing that it came from outside producers, when in fact it was owned by them. I find that both these devices were with the purpose of monopolizing and restraining commerce as aforesaid.

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VII*g*. I find that the defendants attempted to restrict the grind of the Clinton Sugar Refining Company, and instituted a competition in candy at less than cost, for the purpose of impeding the business of that company, and of securing to itself the custom of candy manufacturers, and that this was done with the same monopolistic intent as above stated.

VII*h*. I find that during the years 1910 and 1911 the defendants, having control of the prices at which glucose and starch could be manufactured, lowered prices to a sum less than a fair profit, for the purpose of securing the trade to themselves, and harassing, annoying, and, if possible, driving out their competitors, and that this was done with the same monopolistic intent. I also find that they have since **[1011]** 1909 endeavored to secure to themselves, by low prices, as much as possible of the trade in mixed syrup of the kind described in article fifth of the petition, and that this was done with monopolistic intent.

VII*i*. I decline to find that the defendants fixed any resale prices.

VII*j*. I find that the defendants have not used their switching roads since 1906 as a covert means of obtaining rebates.

XV. THE LAW.

Before the cases of *U. S.* v. *Standard Oil Co.*, 221 U. S. 1, 31 Sup. Ct. 502, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, and *U. S.* v. *American Tobacco Co.*, 221 U. S. 106, 31 Sup Ct. 632, 55 L. Ed. 663, it had no doubt been an open question whether the Sherman Act did not forbid all combinations which resulted in terminating a competition theretofore existing, regardless of the effect of that termination upon the industry at large. Those cases must be understood to decide that the effect upon the industry is a factor in determining the illegality of the combination, and perhaps it is yet an open question whether or not the test is to be found only in the combination of enough producing capacity to control supply and fix prices, at least until new capital be induced into the field, or whether it must also be shown that the

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combination has injured the public in the exercise of that power. The opinions of the Supreme Court certainly seem to indicate that it is the power and not its exercise which is the test. *U. S.* v. *Standard Oil Co., supra; U. S.* v. *American Tobacco Co., supra; U. S.* v. *Union Pac. R. R. Co.*, 226 U. S. 61, 88, 33 Sup Ct. 53, 57 L. Ed. 124; *Standard Sanitary Mfg. Co.* v. *U. S.*, 226 U. S. 20, 49, 33 Sup. Ct. 9, 57 L. Ed. 107; *Eastern States Retail Lumber Dealers' Association*, 234 U. S. 600, 613, 34 Sup. Ct. 951, 58 L. Ed. 1490, L. R. A. 1915A, 788; *International Harvester Co.* v. *Missouri*, 234 U. S. 199, 209, 34 Sup. Ct. 859, 58 L. Ed. 1276, 52 L. R. A. (N. S.) 525. This was certainly the opinion before *U. S.* v. *Standard Oil Co. supra; U. S.* v. *Joint Traffic Association*, 171 U. S. 505, 575, 19 Sup. Ct. 25, 43 L. Ed. 259.

Yet it is quite true that the court has also at times spoken in terms which leave it open to argument whether or not it was the public injury done by the combination which makes it illegal. Such is the often-quoted passage in Mr. Justice Holmes' opinion in *Nash* v. *U. S.*, 229 U. S. 373, 376, 33 Sup. Ct. 780, 781 (57 L. Ed. 1232), that only such "combinations are within the act as, by reason of intent or the inherent nature of the contemplated acts, prejudice the public interests by unduly restricting competition." There are also passages in the opinion in *U. S.* v. *Standard Oil Co., supra*, which lend themselves to such an interpretation. It must be conceded that the lower courts are not in entire agreement upon the question (*U. S.* v. *International Harvester Co.* [D. C.] 214 Fed. 987), and that the Supreme Court at this time has ordered a reargument of that very case. Yet even the expressions relied upon in these opinions are open to a construction entirely consonant with the rule which makes power only and not the manner of its exercise the test of legality. We have only to assume that all "undue" restraints prejudice the public interest, even though the apparent results are economically benignant to reconcile both forms of expression. Such language might, it is true, cover only distinct economic injuries. A national policy would be intelligible which [1012] looked only at the price and service to the consumer, disregarding the misfortunes of the

producer altogether. Yet even then the consumer's interest in the long run is quite different from an immediate fall in prices, even if the quality of the service is maintained. The very defendants allege that a trade war is bad in the end for consumers, and no doubt they are right. If, therefore, "public prejudice" be the test, it by no means follows that it is to be judged alone by price and quality. A given organization of industry may be thought to react to the public prejudice, regardless of its directly observable results.

If the decisions of the Supreme Court are to be so understood, it is the mere possession of an economic power, acquired by some form of combination, and capable, by its own variation in production, of changing and controlling price, that is illegal. It is not necessary in any view that the combination should exclude, or be able to exclude, all others; it is not necessary that its control should extend beyond such a period as is required to bring in new supply. *U. S.* v. *Patten*, 226 U. S 525, 33 Sup. Ct. 141, 57 L. Ed. 333, 44 L. R. A. (N. S.) 325. If these were necessary conditions, there could, indeed, be no restraint of trade without patent or control of some natural source. Under such an interpretation of the act, Corn Products Refining Company is certainly a combination in restraint of trade, and its excuse is irrelevant, if it were true, that it has had a beneficent effect upon the industry. If the statute condemns an industrial integration of producing units sufficient to fix prices, so long as the total producing capacity remains unchanged, that policy must be respected and enforced, whether it is a good one or a bad.

If, however, it shall be eventually decided that it is the exercise of the power, as so defined, and not the power alone, which is illegal, the case at bar is in the end no different. Under that theory the injuries to the public are shown by the means which the combination has employed in its efforts either to gain or to maintain its position. The means forbidden have been evolved, often empirically, because of a slow recognition that they make for the disorganization of industry and of the depression of a competing producing capacity which, if let alone, could compete upon even terms.

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While the statute under this theory relies upon competition as a proper stimulus to the maintenance of industrial advance and as the chief protection to the consumer, it takes a long view, not a short. It recognizes that with the customer in the end must lie the decision between producers, and that those who fail to secure the market by the quality and cost of their service must pass out of the field; but it does not identify permanent capacity with the inability to endure a transitory or local appeal to customers. Its presupposition is that there may well be competitors capable in the end of giving a service which will serve the public as well as their neighbors, who may yet succumb to concerted competition apparently more serviceable, but only because it is temporary, and is put forward with no purpose of universal application. Possibly it would be hazardous to attempt an absolutely general statement, but it would yet be true to say that nearly all the devices condemned by the courts contain this sporadic element, either of time or place; that is to say, that they cover only a competition which was not intended to be permanent, and which the combination knew was only for the temporary [1013] purpose of extirpating a competitor who had at least some chance in the long run of establishing a service which would be as acceptable as any within the power of the combination itself.

It is on this account that the intent of the combination so often appears in the cases as the determinating factor in illegality. It is not because unfair competition is a crime, but only because a monopolistic intent is the clearest evidence that the competition attempted is shown to be temporary and local, and that there is on this account a reasonable expectation that it will be succeeded by competition which the newcomer might well be able to meet, had his development been all the while left unimpeded. If that temporary or local competition were not coupled with such an intent, if there were honest grounds for supposing that it would or could remain to the permanent advantage of the consumer, the public would have no ground to complain, so long as the organization of industry remains on a competitive basis. The intent is the touchstone, not because we are concerned

with moral delinquency, but with a test of the probable persistence of the combination's course of conduct. As Mr. Justice Holmes, in *Swift* v. *U. S.*, 196 U. S. 375, 396, 25 Sup. Ct. 276, 279 (49 L. Ed. 518), says:

"When that intent and the consequent dangerous probability exist, this statute, like many others and like the common law in some cases, directs itself against that dangerous probability as well as against the completed result."

Similarly, Mr. Chief Justice White, in *U. S.* v. *Standard Oil Co.*, 221 U. S. 1, 76, 31 Sup. Ct. 502, 521 (55 L. Ed. 619, 34 L. R. A. [N. S.] 834, Ann. Cas. 1912D, 734), says:

"We think no disinterested mind can survey the period in question without being irresistibly driven to the conclusion that the very genius for commercial development and organization which it would seem was manifested from the beginning soon begot an intent and purpose to exclude others, which was frequently manifested by acts and dealings wholly inconsistent with the theory that they were made with the single conception of advancing the development of business power by usual methods, but which, on the contrary, necessarily involved the intent to drive others from the field and to exclude them from their right to trade, and thus accomplish the mastery which was the end in view."

These expressions mean that where the intent is established to occupy the whole of an industry, and the intent is accompanied by some appropriate conduct, the competition has already ceased in the sense that the national will has directed. Persons actuated with a desire to monopolize the whole of an industry will try—indeed, are already trying—to keep out others, regardless of whether those others can compete efficiently or not. Their conduct constitutes a social evil, because the public is entitled to the free play of such industrial power and capacity as such outsiders may be able to develop.

The Corn Products Refining Company's industrial history has not only been characterized throughout by attempts to create such sporadic competition, but we have the richest possible evidence that they never meant to maintain it as a policy, but only to drive out weaker competitors, so as to maintain the field. The only device which is open to any question in this respect is the low-priced campaign. It might, indeed, be difficult to establish the temporary char-

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acter of this were it not, first, for the purposes disclosed in its preparation, [1014] and, second, for the fact that it went too far by the defendant's own statements to admit of continuance. They never meant to keep prices so low, and could not have endured, if they had done so, except by making up through excessive prices on specialties. All their conduct illustrates the kind of competition which tries to prevent the development of newcomers who might permanently secure their own position. I will try to state their position, as I understand it, as sympathetically and as strongly as possible. Their only defense, really, in the end comes down to the assertion that their efforts to restrict competition failed:

"The statute condemns a monopoly in the sense of a power to exclude others from entering the industry. It has been proved that, whatever our purposes, the field was never closed to competitors. We have continued with only a small absolute increase in grind, if, indeed, we can truly be said to have increased at all, while our competitors, both those who were in the industry when we combined and those who have since appeared, have grown with extraordinary rapidity. We have no natural or legal monopoly upon which we rely; we hold no trade secrets;. we have no ability that any one else may not procure. We have never tried to limit our own production; on the contrary, we have flooded every avenue of consumption and opened every new available market, often at great initial expense. We have benefited the consumer by insuring him a sound product at a low price. Nor was our original combination without justification. The industry was engaged in that kind of competition from which the consumer in the end must suffer, since it leads to the destruction of the capital involved. No one could make enough money to keep up his producing capacity, yet all feared to fall behind in sales lest they should be obliterated altogether. Some kind of concerted action alone could save the industry from ruin, and it makes but little difference, as the courts themselves have often said, what form it takes. The critical fact was that some kind of joint action was necessary, and that involved an understanding which, no doubt, must in the end result in some slackening in the ruinous race of over-production. So much we acknowledge; but we insist that it was a benefit to the industry, and that it finally relieved it from restraint, instead of imposing restraints upon it."

The answer to this is partly on the facts and partly on the law. If the test be that of power alone, it needs no other answer than the opinions already cited at the beginning of

this point. If the test be the exercise of the power, the question is of fact. They say that they combined to prevent a ruinous competition, and this is true; but the immediate result of the combination was such a rise in price as attracted new capital into an industry whose producing capacity, on paper, was already more than the market would take. This is good evidence that the price was higher, or the quality worse, than need be. It was no public benefit to fix that price at a point where, with ample capacity, new capital came in; or, if it be said that the old plants were too inefficient to compete, it was no public benefit to combine old plants, now called junk by the defendants themselves, so as to preserve them from their own mutual destruction.

As to their conduct toward subsequent competitors, in their failure they forget their repeated efforts to eliminate all newcomers or to suppress the production of those already in. No one can, in fact, tell how far they have succeeded in discouraging the first, or in depressing the expansion of the second. Under a competition free from such practices, inherent weaknesses of their own might have been discovered; they might themselves have been eliminated. Elimination of some was perhaps necessary; much waste is certainly the [1015] price of a competitive organization of industry. The national will has not declared against elimination of competitors when they fail from their inherent industrial weakness. On the contrary, it has declared with great emphasis against any methods by which such weaknesses might be concealed; in so doing it has assumed a positive purpose toward industry, has established a form to which competition must conform. This purpose the Corn Products Refining Company has persistently and ingeniously endeavored to thwart from the outset. Its constant effort has been to prevent competitors from that test which would in the long run discover whether they could manufacture as well and as cheaply as itself. It has tried throughout, by its power temporarily to affect commercial conditions, so to obscure the actual industrial facts as to make impossible any test of relative strength. That it has failed does not change the past or make its continued existence in any sense less com-

promising to the future. There is every assurance that it will continue unfair trade methods, unless it be forcibly prevented. I therefore find that it is an illegal combination.

XVI. THE REMEDIES.

By far the most important question in the case is whether the remedies which the Government shall have shall be limited to an injunction, or whether they should include a dissolution of the Corn Products Refining Company into four or five constituent parts. That there should be an injunction admits of no question. Some of the unfair practices have undoubtedly been stopped; some ceased long before the petition was filed, and there is indeed no reason to suppose that they will again be resumed; but defendants are in no position to complain against a decree of court specifically forbidding them from any resumption of practices which were merely the incidental manifestations from time to time of a purpose which actuated them throughout their whole progress. The injunction will cover in detail the specific matters already considered, such as profit-sharing, a low-price campaign, bogus independents, price agreements, attempts in any way to prevent the entry of others into the industry, or to secure agreements to restrict competition from those already in, and such other details as shall be appropriate.

The question of dissolution turns upon different considerations. As has already been said, if power alone be forbidden by the statute, it can make no difference whether its results are beneficent or sinister, whether a dissolution will affect the industry to its prejudice or to its advantage, whether it will promote or depress foreign trade. So much is indeed implied in the opinions in those cases already cited in Point XV. Such questions concern the wisdom of the act, and with it I have nothing to do if once its purpose be authoritatively declared.

If, on the other hand, the exercise of the power is what the statute touches, then the question arises, What is practically necessary to prevent the repetition of those unfair means? The defendants' solicitude against dissolution

seems to me to be significant in this connection. It is conceded that each of their units is as large as the law of increasing returns demands, and there is no apparent reason why they should fear dissolution if they mean to adopt that kind of competi[1016]tion which the law contemplates. In order to test the injury which they anticipate, and their good faith in opposing dissolution, it is fair, therefore, to consider their objections in detail.

[3] The chief ground is that dissolution would have an immediate and disastrous effect upon the foreign trade. The argument is as follows: At the present time Edgewater sends two-thirds of its product to Europe, and in so doing has spent large sums of money in opening up many currents of foreign trade. If the combination were divided into competing units, Edgewater at times could find a more profitable individual market by competition along the Eastern seaboard, working out so far to the West as freight differentials allowed. At periods, for example, when Argentine corn can be imported into the port of New York, the local advantage of Edgewater becomes high. If it were a separate plant, whose policy was dictated alone by the interests of its stockholders, in those periods it would compete effectively with the Western plants and would diminish its foreign trade. At present, at such periods, it continues its export business, relying upon the Western plants to supply that portion of the demand which it would itself supply if it were acting alone. It is true that there would remain sporadic periods when it would export, times of "dumping," but the development of a sustained foreign export trade would be impossible, once Edgewater were divorced from the combination as a whole. As it is, that plant is pressed to maintain its position against foreign manufacturers having themselves access to Argentine corn. If it could find a ready local market of its own, it would inevitably seize that.

The argument comes to this: That in times of cheap Argentine corn Edgewater does not use its advantage to sell to the Atlantic seaboard (Bedford, indeed, says that it could at times show a profit in Chicago), but uses that advantage for foreign trade. The question really is whether the local con-

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sumer should be deprived of that advantage for the sake of maintaining foreign trade, and that depends upon what the relative valuation of the two advantages should be. I cannot think that a court is competent to determine such a preference; it depends rather upon questions of national policy, the indirect benefits of foreign trade, which can be dealt with only where each interest is effectively represented. Certainly I have no means of saying that the commercial advantage of cheap Argentine corn ought to be enjoyed by the manufacturers here, or the foreign consumer, as against the Eastern American consumer. It is indeed easy to see that this would be a compelling motive urging competitors of the Corn Products Refining Company to join in opposing any dissolution, but their interest in this respect is not necessarily coincident with that of the general public, and their opinion is inevitably interested.

It is quite true that dissolution might result in an overproduction within the United States, and so in the end in the elimination of some of the producing units; but this again is the same problem in another form. It means that because of the present unitary control of Edgewater and the other Corn Products Refining Company plants, in periods when there is a differential favoring Edgewater, that differential is used for the benefit of export trade, rather than to throw out [1017] that part of the Western supply which because of its higher cost could not be marketed in the East. I am not aware of any obvious and compelling policy which makes it advisable to favor a more expensive manufacture in the West, with its necessary higher prices to the consumer, for the sake of foreign trade. The decision of such questions certainly should not rest with the producers themselves, nor, as I have said, is it a proper matter for courts. The foreign trade of the competitors of the Corn Products Refining Company has so far been of a trifling character. In 1912 it represented less than 8,000,000 pounds of glucose out of a total of 278,000,000, and of starch less than 700,000 out of a total 2,000,000. The question really seems to concern, therefore, only the export trade of Edgewater itself. I shall therefore lay from consideration this feature of the evidence.

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[4] The next objection is that a dissolution will involve the expenditure of large sums of money to readapt the several plants to stand upon a self-subsisting basis. Argo is the largest of all, but is especially adapted to manufacture the specialties, so called—dextrines, gums, grape sugar, and syrup. It must either discontinue some of its manufacture of specialties or put in more bulk-producing capacity. The reason for this is said to be that in selling it must be possible to supplement the specialties with bulk supply in order to hold customers. No plant could undertake to sell specialties alone, though it manufactured itself all the glucose and starch which went into them. Pekin is at present a starch plant altogether, though it has a glucose refinery of 12,000 bushels out of a total capacity of 30,000; it would have to develop a more diversified business if it were to sell alone. Granite City is a syrup-mixing plant, making its own glucose; it might succeed in its town territory, but the matter is problematical. Davenport is only a reserve plant, not usually operated, and somewhat antiquated as well. It would not make an economical unit.

I do not doubt that a dissolution in the case would operate to the disadvantage of the total production, and that it would require readjustment of the plan of manufacture of each plant; but there is nothing in this evidence which indicates any serious demoralization of the industry at large. Argo could certainly maintain its grind, even if part of the glucose and starch were sold as bulk products. The result would be to leave unemployed so much of its capacity for making end products as now rely upon the bulk capacity of Pekin and Granite City. In so far it would injure the usefulness of that much of the capital already invested. Pekin may have been used as a bulk-starch house, but with so large a glucose capacity it cannot be said to be a specialized plant. Indeed, there are, as it is, plants which do nothing but a starch business, e. g., Douglas, Huron, Staley, Piel, and Keever, which have never done anything else, just as there are plants which have made nothing but glucose, as the Clinton Company. The only competitors which have made both starch and glucose between 1906 and 1914 are Hubinger,

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Union Company, and the American Maize Products Company. Similarly, the Granite City plant need not make starch; possibly it might have to sell part of its glucose unmixed, but that, as in the case of Argo, would only make less useful so much of its finishing plant as could not be employed. Davenport [1018] seems to me to have a questionable value as it is; it is not generally operated at all, and is run as a reserve. A question might arise as to the propriety of allowing its union with Pekin or Granite City, if need were.

None of these considerations seem to me sufficient to prevail over the wisdom of disintegrating a combination which has shown such an inveterate and incorrigible insistence upon interfering with the course of commerce which the law demands. That the general organization of the Corn Products Refining Company would be disrupted would, of course, follow; it is, indeed, the very purpose of the relief itself. The suit is, it is true, not punitive in its character; but the stockholders are in such cases responsible for the conduct of the business by the officers in charge. Such loss as is involved in removing from their hands the power which they have so persistently used contrary to law is an inevitable, though unfortunate, incident in the enforcement of the statute.

In all cases where the history of the combination has been such as this the Supreme Court has declined to rest upon injunctions alone. The difficulties of proof, the delay, the cumbersome inquiry necessary to ascertain again whether the defendants shall have actually discontinued, all make against such a limitation. It may be safely assumed that evidence such as was by chance available here of the actual purposes of those in charge will never again exist. Without it, perhaps, it is doubtful whether the case could have been proved. Yet it is a reasonable assurance to take that, when an innate proclivity has so abundantly manifested itself over a period of years, it shall be disabled from further opportunity. No case, it seems to me, could more require such a remedy, unless injunctions are to serve for the only remedy. It is clear enough that, had dissolution been

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decreed in 1906, no court would have allowed any units so large as the present Corn Products Refining Company. The precise form of redistribution will have to come up later, but a combination of 60 per cent of the whole industry would not have been considered.

The form of the decree as concerns dissolution will in general follow that in the case of *U. S.* v. *International Harvester Company*, except that the time within which to file a plan will be 120 days instead of 90, and that the plan will be filed with the Federal Trade Commission as master in chancery, under section seven of the Federal Trade Commission Act. That commission will in due course present a plan for dissolution, which will come on for confirmation to the district court as the report of any master in chancery.

XVII.

I see no reason to exempt from the injunction the defendants Speyer, Boardman, Kelsey, and Nichols. They were all directors for three years before petition filed, and must be supposed to be privy to the general plans of the company. If they wish, they may be excluded from such parts of the decree as cover any trade practices which terminated before January 1, 1910.

The final decree may be settled upon five days' notice to the defendants.

MOTION PICTURE PATENTS CO. *v.* UNIVERSAL FILM MFG. CO. ET AL.

(Circuit Court of Appeals, Second Circuit. June 15, 1916. On Petition for Rehearing, August 4, 1916.)

[235 Fed. Rep., 398.]

Monopolies 17 (2)—Patents—Restrictive Licenses.—Under the Clayton bill (act Oct. 15, 1914, c. 323, § 3, 38 Stat. 731), making it unlawful to lease or sell goods, machinery, or supplies on a condition that the lessee or purchaser shall not use or deal in the goods, machinery, or supplies of a competitor of the lessor or seller, where such condition may substantially lessen competition and create a monopoly, complainant, who by virtue of patents had a monopoly for the manufacture of motion picture projecting machines, cannot, in selling or leasing such machines, require the purchaser to use

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films manufactured by it, its letters patent for films having expired, and such a contract is invalid, as tending to create a monopoly.*

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 13; Dec. Dig. 17(2).]

MONOPOLIES 10—STATUTES—APPLICABILITY.—The Clayton bill, leveled at monopolies, applies to contracts entered into before its enactment.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 9; Dec. Dig. 10.]

MONOPOLIES 10—POWER OF STATE—CLAYTON BILL—APPLICABILITY.—Where a contract involved and restrained interstate commerce, the Clayton bill is applicable, though the particular acts of restraint and infringement occurred in the State of New York, where the contract was made.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 9; Dec. Dig. 10.]

MONOPOLIES 23—RIGHTS UNDER CONTRACTS—USE OF PATENTED ARTICLES—RESTRICTION.—Where the holder of a patent for motion picture projecting machines required one licensed to manufacture to impose conditions as to the use of films in the machines, in violation of the Clayton act, one who leased a machine sold by the manufacturer to a third person is not bound to observe such conditions, on the theory that a patent license cannot be relied on and its terms repudiated.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 16; Dec. Dig. 23.]

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PATENTS 210—SALE OF PATENTED ARTICLE—USE.—The sale of a patented motion picture projecting machine carries with it, in the absence of restriction, an implied license of use.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 301, 302; Dec. Dig. 210.]

PATENTS 216—CONSTRUCTION—RESTRICTION.—The fact that there was attached to a patented motion picture projecting machine a plate reciting that the sale and purchase of the machine gave only the right to use it upon other terms to be fixed does not, where it did not appear that the terms relating to royalty were ever fixed or brought to the notice of a purchaser from a licensee to manufacture, entitle the holder of the patent rights to royalties.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 329; Dec. Dig. 216.]

[399] PATENTS 216—CONSTRUCTION—RESTRICTION.—In such case, evidence that the purchaser had knowledge of the terms upon which the holder of the patent rights was accustomed to grant permission to use a machine manufactured by its licensees will not establish the purchaser's liability for royalties; there being nothing

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in the notice to prevent the holder of the patent rights from varying the royalties.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 329; Dec. Dig. 216.]

Appeal from the District Court of the United States for the Southern District of New York.

Bill by the Motion Picture Patents Company against the Universal Film Manufacturing Company, the Universal Film Exchange of New York, and the Prague Amusement Company. From a decree dismissing the bill, complainant appeals. Affirmed.

This cause comes here on an appeal from a decree dismissing the complainant's bill. The complainant is the owner of the patent in suit (No. 707,934) for motion picture projecting machines, and on June 12, 1912, granted to the Precision Machine Company a license to manufacture and sell these machines for not less than $150 per machine, and at a royalty of $5 to the licensor each, with the further restriction that each machine put out by the licensee shall be used (1) solely for exhibiting or projecting motion pictures containing the invention of reissued Letters Patent No. 12,192, leased by a licensee of the licensor while it owns said patent; and (2) upon other terms to be fixed by the licensor and complied with by the user while the said machine is in use and while the licensor owns said patents (which said other terms shall only be the payment of a royalty or rental to the licensor while in use). The license also provided that a plate should be attached to each machine and such plate was attached in the following form:

"Mfr's. Serial No. 3557. Special License No. 3666.

"SIMPLEX.

"MADE BY THE PRECISION MACHINE COMPANY

"Patented.

"No. 576,185, March 2, 1897. No. 580,749, April 13, 1897.
"No. 586,953, July 20, 1897. No. 673,329, April 30, 1901.
"No. 673,992, May 14, 1901. No. 707,934, August 26, 1902.
"No. 722,382, March 10, 1903.

"The sale and purchase of this machine gives only the right to use it solely with moving pictures containing the invention of Reissued

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Patent No. 12,192, leased by a licensee of the Motion Picture Patents Company, the owner of the above patents and reissued patent, while it owns said patents, and upon other terms to be fixed by the Motion Picture Patents Company and complied with by the user while it is in use and while the Motion Picture Patents Company owns said patents. The removal or defacement of this plate terminates the right to use this machine.

"MOTION PICTURE PATENTS COMPANY,
"*New York, N. Y., U. S. A.*"

Reissued letters patent No. 12,191 expired subsequent to the execution of the license by the complainant to the Precision Machine Company. Thereupon the Universal Film Manufacturing Company made a film embodying that invention, and sold it to the Universal Film Exchange, who furnished it for use to the Prague Amusement Company. The Seventy-Second Street Amusement Company became the lawful possessor of a moving picture machine made by the Precision Machine Company. The defendant Prague Amusement Company leased the machine from the Seventy-Second Street Amusement Company and used the film furnished to it by the Universal Film Exchange upon the machine in question. The use of the film upon the machine is the act of infringement alleged. The defendants set up three defenses: (1) That the restrictions in the contract of license to the Prague Amusement Company are contrary to public policy, illegal, and void, and the machine therefore is free from the bur[400]den of them. (2) That there is no proof of joint infringement as alleged. (3) That the patent is invalid.

Melville Church, of Washington, D. C., and *George F. Scull*, of New York City, for appellant.

Edmund Wetmore, *John B. Stanchfield*, and *Oscar W. Jeffery*, all of New York City, for appellees.

Before COXE and ROGERS, Circuit Judges, and AUGUSTUS N. HAND, District Judge.

AUGUSTUS N. HAND, District Judge (after stating the facts as above).

[1] It was held by this court in the case of *Victor Talking Machine Company* v. *Strauss*, 230 Fed. 449, 144 C. C. A. 591,

that a license to use a patented talking machine upon payment of an initial royalty to cover the life of the patent and upon condition that the licensee purchase all sound records to be used with the machine from the licensor was valid, even though the license provided that title to the machine should pass to the licensor upon the expiration of the patent if the terms of the license had been observed. The present case differs from that case because here the title to the machine at once passed by the sale of the projecting machine to the Seventy-Second Street Amusement Company. We think this case comes within the doctrine of *Bauer* v. *O'Donnell*, 229 U. S. 1, 33 Sup. Ct. 616, 57 L. Ed. 1041, 50 L. R. A. (N. S.) 1185, Ann. Cas. 1915A, 150, rather than that of *Henry* v. *Dick*, 224 U. S. 1, 32 Sup. Ct. 364, 56 L. Ed. 645, Ann. Cas. 1913D, 880. This is especially true since the enactment of the so-called Clayton Bill, which provides:

"That it shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States, or any territory thereof * * * on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce." Act Oct. 15, 1914, c. 323, § 3, 38 Stat. 731.

This act was not regarded as applicable either in the District Court, or in this court, in the case of *Victor Talking Machine* v. *Strauss*, *supra*, because that case was decided upon a demurrer to the bill upon the face of which no substantial restraint of competition or monopoly in any line of commerce appeared. Here, however, the testimony shows that the complainant has a monopoly under its patents of projecting machines so that, if no films not manufactured by complainant can be used upon these machines, the complainant will obtain an absolute monopoly of the film business, in spite of the fact that its patent on films has expired. If the prohibitions of the Clayton Act mean anything at all, this case falls within them, and the restrictions as to

use of films other than complainant's with the projecting machines are therefore void. Indeed, the report of the Judiciary Committee of the House concerning the Clayton Act shows that its purpose is to reach [401] the film monopoly. A portion of this report, quoted by Judge Dyer in his opinion in *United States* v. *United Shoe Machinery Co.* (D. C.), 227 Fed. 507, is as follows:

"Where the concern making these contracts is already great and powerful, such as the United Shoe Machinery Company, the American Tobacco Company, and the General Film Company, the exclusive or 'tying' contract made with local dealers becomes one of the greatest agencies and instrumentalities of monopoly ever devised by the brain of man. It completely shuts out competitors, not only from trade in which they are engaged already, but from the opportunities to build up trade in any community where these great and powerful conditions are appearing under this system and practice."

[2] Judge Sessions has held in the case of *Elliott Machine Co.* v. *Center* (D. C.) 227 Fed. 126, that this act applies to contracts made before the passage of the act, and we think his opinion justified by decisions of the Supreme Court on which he relied. *Louisville & Nashville Railroad Co.* v. *Mottley*, 219 U. S. 467, 31 Sup. Ct. 265, 55 L. Ed. 297, 34 L. R. A. (N. S.) 671; *Armour Packing Co.* v. *United States*, 209 U. S. 56, 28 Sup. Ct. 428, 52 L. Ed. 681; *Philadelphia, Baltimore & Washington R. R.* v. *Schubert*, 224 U. S. 603, 32 Sup. Ct. 589, 56 L. Ed. 911. In the case of *United States* v. *United Shoe Machinery Company* (D. C.) 227 Fed. 507, Judge Dyer reached the same conclusion in regard to the Clayton Act.

[3] Inasmuch as the contract with the Precision Machine Company involved and restrained interstate commerce, it makes no difference that the particular act of infringement occurred within the State of New York, and the prohibitions of the Clayton Act apply. *Marienelli* v. *United Booking Offices* (D. C.) 227 Fed. 170; *Nash* v. *United States*, 229 U. S. 373, 33 Sup. Ct. 780, 57 L. Ed. 1232.

[4] It is urged that the defendant Prague Amusement Company cannot rely upon the license and repudiate its terms. It does not rely upon the license, but obtained a lease of the machine from the owner, the Seventy-second

Street Amusement Company, which acquired it after having paid the purchase price, and thus freed the machine from the unlawful restrictions. The remarks of this court upon the motion for a stay pending the decision of the appeal from Judge Dickinson's decree in the criminal prosecution for violation of the Sherman Act (act July 2, 1890, c. 647, 26 Stat. 209), in *United States* v. *Motion Picture Patents Co.* (D. C.) 225 Fed. 800, would be applicable to the case, if the restrictions we have held illegal had been held valid. Then it would have been true that the defendant, who was using the patented article under a license, could not question the validity of the patent, or claim it lacked invention. These remarks are not applicable when the restrictions are held invalid, and the article, having been thus freed from all restrictions, may be used at the will of the licensee.

In view of the foregoing considerations, it is unnecessary to discuss the other defenses raised by the defendants, and the decree dismissing the bill is affirmed.

ON PETITION FOR REHEARING.

PER CURIAM.

The appellant seeks a reargument upon the question whether the Prague Amusement Company did not infringe by not [402] complying with the condition as to royalty or rental imposed by the appellant on users of machines manufactured under its licenses.

[5, 6] The sale of the projecting machine carried with it, in the absence of any restriction, an implied license of use. *Mitchell* v. *Hawley*, 16 Wall. 547, 21 L. Ed. 322. The notice which was attached attempted to impose the condition that it should only be used with films containing the invention of a patent which had expired "and upon other terms to be fixed by the Motion Picture Patents Company." The condition as to use only with the specified films we have held illegal for the reasons given in our opinion heretofore rendered. The condition as to which a reargument is desired relating to a continuing royalty was not brought to the notice of the defendants and cannot, therefore, be regarded

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as limiting the implied license which accompanied the sale of the machine. *Cortelyou* v. *Johnson*, 207 U. S. 196, 28 Sup. Ct. 105, 52 L. Ed. 167; *Lovell-McConnell Mfg. Co.* v. *Waite Auto Supply Co.* (D. C.), 198 Fed. 133. The clause "upon other terms to be fixed" in no way specified the nature of these terms and, in particular, in no way mentioned a continuing royalty, or the amount thereof. There is no evidence, moreover, that any "other terms" were ever fixed or demanded. We think such a vague condition insufficient to limit the implied right of user passing to the vendee of the machine, and consequently unenforceable.

[7] The appellant offered evidence at the trial, which was excluded, that the Prague Amusement Company had knowledge of the terms upon which the Motion Picture Patents Company was accustomed to grant permission to use a machine put out by its licensed manufacturers; but this evidence, had it been allowed, would not have obviated the difficulty with the form of the notice. If the terms that were customary had been known, there was nothing in the notice or elsewhere to prevent the appellant from varying the royalty as to nature or amount. Such a condition is too indefinite for enforcement, though a notice of a precise amount to be paid might be perfectly good. The notice affixed to the machine was so broad as to allow the patentee to fix any terms he might choose and to be repugnant to all rights which the owner of the machine might have obtained by his purchase and implied license.

The motion for a reargument is denied.

UNITED STATES *v.* ASSOCIATED BILL POSTERS ET AL.[a]

(District Court, N. D. Illinois, E. D. March 14, 1916.)

[235 Fed. Rep., 540.]

MONOPOLIES 12(2)—WHAT CONSTITUTES—SHERMAN ACT.—Where, by an association of bill posters, who refused to accept advertising from persons patronizing competitors, competition was practically

[a] This case is pending in the Supreme Court on the appeal of the defendants.

stifled and a monopoly established, such monopoly is in violation of the Sherman Act, though the monopoly produced a general improvement in the bill-posting business.[*]

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 10; Dec. Dig. 12(2).]

In Equity. Bill by the United States against the Associated Bill Posters and others. Decree for complainants.

[541] *Charles F. Clyne*, of Chicago, Ill., *George W. Wickersham*, of New York City, *J. A. Fowler*, of Washington, D. C., and *Stanley D. Montgomery*, of New York City, for the United States.

Russell Whitman, *Davis & Rankin*, and *Ringer, Wilhartz & Louer*, all of Chicago, Ill., *Alexander, Cohn & Sondheim*, of New York City, *Wm. H. Leahy*, of Pittsburgh, Pa., and *Wilson, Moore & McIlvaine*, *Harris Carman Lutkin*, *Goss & Rooney*, and *Chytraus, Healey & Frost*, all of Chicago, Ill., for defendants.

LANDIS, District Judge.

The defendant organization is composed of bill posters owning bill-boards in several thousand of the most desirable cities and towns throughout the United States. The object of the organization is to control the business of national poster advertising throughout the country, and to limit the display of national posters at prices fixed by the organization to the boards of members of the organization, there being but one member in each city or town.

To accomplish this, the members agreed to post and display on their boards the posters of only such advertisers as limit their patronage to members of this organization, and to refuse to post, and to exclude from their boards, the posters of such advertisers as should patronize the boards of a competing bill poster or non-organization member in any locality where there are bill-boards of members of the organization.

As a means to this end the business of soliciting the poster advertising of national advertisers was, by agreement of the

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members, limited to seven or eight designated persons and corporations, called "official solicitors," such solicitors paying an annual fee to the organization. To secure to these solicitors a monopoly of the business of soliciting advertisements, it was agreed that the members should pay these solicitors as their compensation $16\frac{2}{3}$ per cent of all moneys received by such members from advertisers for posting their advertisements, and that the member would pay no compensation for soliciting advertiser's business to any advertising solicitor who was not an official solicitor.

To secure obedience to the organization plan by members and official solicitors and advertisers, it was agreed that penalties should be inflicted upon such members, official solicitors, and advertisers as failed to observe and adhere to the plan. The result is that the members of this organization now have a practical control of the posting of national advertising in the several thousand cities and towns throughout the United States where boards of such members are located, and that such national advertising in those localities is practically excluded from independent boards.

Evidence was presented by the defendants of a general improvement in, and development of, the whole bill-posting business during the existence of the organization and its predecessor. But, granting to this evidence all that defendants claim for it, the court is of the opinion that the decree must go to the complainant, for the reason that the whole spirit and policy of our law is opposed to agreements among persons and corporations designed to exclude other persons from [542] legitimate commerce. The Sherman Law was expressly conceived and enacted to this end.

The rule of "reasonable restraint" has no application here, for the reason that this is not a case of mere restraint, but of total exclusion. Even perfection in any line of business is not to be thus procured.

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DOWD *v.* UNITED MINE WORKERS OF AMERICA ET AL.

(Circuit Court of Appeals, Eighth Circuit. July 21, 1916.)

[235 Fed. Rep., 1.]

APPEAL AND ERROR 866(1)—REVIEW—QUESTIONS CONSIDERED—JUDGMENT ON DEMURRER.—On writ of error from a judgment dismissing an action on demurrer to the complaint, the appellate court is not limited to a consideration of the particular ground of demurrer sustained by the trial court, but all questions raised by the demurrer are reviewable.[a]

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3467-3473; Dec. Dig. 866(1).]

MONOPOLIES 28—ANTI-TRUST ACT—ACTION FOR VIOLATION—PARTIES DEFENDANT—"ASSOCIATIONS."—In Anti-Trust Act, July 2, 1890, c. 647, § 8, 26 Stat. 210 (Comp. St. 1913, § 8830), providing that the word "person" or "persons," wherever used in the act, shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country, the word "associations" includes unincorporated associations, such as labor organizations, recognized by Federal and State legislation as lawful, and such an organization may be sued by its name, under section 7, by one injured in his business or property by its action in violation of the provisions of the act.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 18; Dec. Dig. 28.

For other definitions, see Words and Phrases, First and Second Series, Association.]

MONOPOLIES 28—ANTI-TRUST ACT—ACTION FOR DAMAGES—SUFFICIENCY OF COMPLAINT.—The complaint in an action brought under section 7 of the Anti-Trust Act by the receiver of certain coal companies against a labor organization and its constituent organizations to recover damages for injury to the business and property of the coal companies by reason of a conspiracy and combination of defendants in violation of the act, and acts done by them pursuant thereto, considered, and *held* to state a cause of action as against a general demurrer.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 18; Dec. Dig. 28.]

MONOPOLIES 28—ANTI-TRUST ACT—ACTION FOR DAMAGES—DEFENSES.—That a plaintiff in such an action was not, at the time of the alleged unlawful acts of defendants, actually engaged in interstate commerce, [2] does not deprive him of a right of action, where he

[a] Syllabus copyrighted, 1916, by West Publishing Company.

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was preparing to so engage, and was prevented by the wrongful acts of defendants.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 18; Dec. Dig. 28.]

MONOPOLIES 28—ANTI-TRUST ACT—ACTION FOR DAMAGES—DEFENSES.—That the alleged unlawful acts of defendants did not relate directly to interstate commerce is not a defense, where it was their purpose to restrain such commerce, and that was their necessary, although indirect, effect.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 18; Dec. Dig. 28.]

In Error to the District Court of the United States for the Western District of Arkansas, Frank A. Youmans, judge.

Action at law by A. S. Dowd, as receiver for the Coronado Coal Company and others, against the United Mine Workers of America and others. Judgment for defendants, and plaintiff brings error. Reversed.

Henry S. Drinker, jr., of Philadelphia, Pa., and *James B. McDonough*, of Ft. Smith, Ark. (*Walter Gordon Merritt*, of New York City, on the brief), for plaintiff in error.

G. L. Grant and *Webb Covington*, both of Ft. Smith, Ark. (*Henry Warrum*, of Indianapolis, Ind., on the brief), for defendants in error.

Before SANBORN, ADAMS, and CARLAND, Circuit Judges.

CARLAND, Circuit Judge.

Dowd, hereafter called plaintiff, as receiver of nine coal mining companies, commenced this action against the defendants in error, hereafter called defendants, to recover damages resulting from an alleged unlawful conspiracy and combination formed by them in restraint of trade and commerce among the several States of the United States, in violation of the act of July 2, 1890 (26 Stat. 209). The defendants named in the complaint are the United Mine Workers of America, about 27 local unions of the same, and numerous individual defendants, comprising, among others, the president and other officers of the United Mine Workers of America and the presidents and other officers of the district branches and local unions of the same.

The complaint alleges that the United Mine Workers of America is an unincorporated association of mine workers, engaged in or about the work of mining and shipping coal in and from the different mines throughout the United States, its headquarters being located at the city of Indianapolis, in the State of Indiana; that the members of said association are sub-divided into about 30 districts, and numerous local unions are located therein, each district having jurisdiction of the local unions within its territory; that every member of said local unions is a member of the United Mine Workers of America, and subject to the rules laid down in its constitution and by-laws, as well as the constitution and by-laws of the various district and local unions having jurisdiction over them, respectively; that the membership of the United Mine Workers of America exceeds 400,000 miners; that [3] each of the district branches and local unions, which are a part of the United Mine Workers of America, are created by said United Mine Workers of America to carry out the purposes and business of said national organization, and more particularly to act with and for said national organization in carrying out the combination and conspiracy in respect of interstate trade and commerce set forth in the complaint; that the defendant United Mine Workers of America, district 21, is one of the said district branches of said United Mine Workers of America, and has jurisdiction over all union mines and miners in the States of Arkansas, Oklahoma, and Texas, and that all of the defendant local unions above named are affiliated with and subject to the laws of district 21; that the local unions named as defendants are unincorporated associations of mine workers in the State of Arkansas.

The United Mine Workers of America and the several unions demurred to the complaint upon the following grounds: (1) The court had no jurisdiction of the subject of the action, as it appeared from the complaint that neither of the coal companies were engaged in interstate commerce at the time of the alleged acts causing the damages sued for, within the meaning of the act of July 2, 1890. (2) The complaint failed to disclose that the court had any jurisdiction

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of the cause of action, for the reason that the acts complained of were not an interference with interstate commerce or a violation of the above act. (3) The court had no jurisdiction of the defendant or the subject of the action, for the reason that defendants United Mine Workers of America and the several local unions are voluntary unincorporated associations, and as such have no power to sue and cannot be sued. (4) The complaint does not allege any contract, combination, or conspiracy in restraint of trade or commerce within the meaning of the above act. (5) The complaint does not allege any acts of defendants monopolizing or attempting to monopolize, combining, or conspiring to monopolize, any part of such trade or commerce within the meaning of the above act. Two other grounds of demurrer were mentioned, namely, a misjoinder of parties plaintiffs, and a misjoinder of causes of action. These grounds are not argued in the briefs, and will be deemed abandoned. The individual defendants demurred to the complaint upon the same grounds, except that no point was made that these defendants could not be sued. The court below sustained the demurrers upon the specific ground, as recited in the judgment:

"That the complaint fails to disclose that this court has any jurisdiction of the cause of action therein set forth, for the reason that the acts of defendants complained of were not an interference with interstate commerce, or a violation of the Federal statute upon which the complaint is predicated."

The other grounds of demurrer were in terms overruled.

[1] As the plaintiff alone sued out a writ of error, it is contended that our power to review is limited to the point ruled against the plaintiff; but it was the demurrers that were sustained, and the scope of our power to review cannot be limited by the specific reason given by the court below for its judgment. Such judgment may be right or wrong, notwithstanding the reason given for it. The plaintiff [4] elected to stand upon the complaint, which was thereupon dismissed. Claiming the point to be jurisdictional, the United Mine Workers of America and the several unions made a motion in this court to dismiss the writ of error, upon the ground that defendants are voluntary unincorporated

associations or labor unions, having no legal entity, not registered under any trade-union law of the United States or of any State or Territory, and cannot sue or be sued, and are not engaged in any kind of business.

All of the defendants made a similar motion, for the reason that the writ of error in this case should have issued from the Supreme Court of the United States. This motion is denied, for the reason that the judgment is properly reviewable by this court, the writ of error sued out by the plaintiff from the Supreme Court of the United States has been dismissed, and the point in reference to the plaintiff's right to sue the United Mine Workers of America and the different local unions by name, having been one of the grounds of demurrer in the court below, will be considered here on this writ of error, for the reasons hereinbefore stated, as the defendants still insist upon the point. The questions, then, for consideration are: (1) May the United Mine Workers of America and the different local unions be sued in the name of the association? (2) Does the complaint State a cause of action?

[2] The complaint was filed September 1, 1914, and the acts of which complaint is made are alleged to have occurred early the same year. Taking up the first question suggested, we find that section 7 of the act of July 2, 1890, reads as follows:

"Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act may sue therefor in any circuit court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained and the costs of suit, including a reasonable attorney's fee."

Section 8 of the same act provides:

"The word 'person' or 'persons,' wherever used in this act, shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country."

Section 4 of the act of Congress of October 15, 1914 (38 Stat. 731, c. 323), provides:

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"Any person who shall be injured in his business or property by reason of anything forbidden in the Anti-Trust Laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

It will be noticed that section 4 of the act of October 15, 1914, eliminates any description of the persons or corporation by whom the injury shall be committed, leaving the party injured free to pursue any one who causes the injury. It is claimed by the defendants the United Mine Workers of America and the several local unions that the word [5] "associations" found in section 8, above quoted, means associations which have a legal entity by reason of having been organized under the laws of the United States, their Territories, the States, or the laws of a foreign country; that the words "existing under" or "authorized by" mean that the word "association" refers only to an association having a legal entity by force of law; and that the United Mine Workers of America and the local unions, not having been shown in this case to be organized under any particular law, may not be held liable under section 7, above quoted, in the name of the association. Such a construction of the law would relieve labor organizations generally from all liability. The United States Supreme Court in *Loewe* v. *Lawlor*, 208 U. S. 274, 301, 28 Sup. Ct. 301, 310 (52 L. Ed. 488, 13 Ann. Cas. 815), said:

"The records of Congress show that several efforts were made to exempt, by legislation, organizations of farmers and laborers from the operation of the act, and that all these efforts failed so that the act remained as we have it before us."

We were of the opinion that it was clearly not the intention of Congress to exempt any one from liability for injuries caused by combinations and conspiracies in restraint of interstate trade. We therefore decide that the word "associations," in section 8, includes unincorporated associations, such as the defendants are shown to be. The defendants, of course, will not take the position that the associations are outlaws, for they are continually recognized in

the legislation of Congress and of the several States as lawful associations. A notable instance of this is contained in section 6 of the act of Congress of October 15, 1914, where it is said:

"Nothing contained in the Anti-Trust Laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the Anti-Trust Laws."

The defendants, composing an organization of 400,000 miners, capable of doing great good or wrong, claim they are not liable to be sued in the name of the association, but that the injured plaintiff must pursue the individual members whom he can show were liable for the injury, leaving the powerful organization to go free. We do not think it can be said that the defendants United Mine Workers of America and the local unions are not associations existing under or authorized by law within the meaning of section 8, above quoted. But, if defendants are associations within the meaning of the law, it is next insisted that an unincorporated association can not be sued in the name of the association. It is true that, in the absence of a specific statute to the contrary, the rule at common law and under the codes is that an unincorporated association is not recognized as having a legal existence apart from its members. The action lies against the members individually, but not against the unincorporated association in its col[6]lective capacity and name. In many of the States statutes have been passed changing this rule, so that unincorporated associations not having corporate powers may be sued in the name of the association. It has also been ruled that the commmon-law rule, that only entities known to the law are capable of being sued, may not only be modified by express enactment, but also by statutory implication. *Taff Vale R. Co.* v. *Amalgamated R. Servants' Society*, 85 L. T. Rep. (N. S.) 147.

If we are correct in our view that voluntary unincorporated associations are included in the word "associations"

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as used in section 8, above quoted, then we are of the opinion that there is a clear and necessary implication that the association may be sued in its own name; otherwise the provision in the law that the association should be liable could not be enforced, and the law would fail as against all such associations, the remedy of the injured party being confined to an action against the mere agents and employees of the association, in most cases unable to respond in damages. The question as to the liability of an unincorporated labor organization to be sued under the act of July 2, 1890, in the name of the association, does not seem to have been discussed in any reported case which we have been able to find. The fact that labor organizations were before Congress seeking to be exempted from the act is of course conclusive evidence that Congress knew of such organizations, and did not intend to exempt them, while by Clayton Act Oct. 15, 1914, § 4, a remedy is given to one injured in his business or property by reason of anything forbidden in the Anti-Trust Laws, regardless of who shall commit the injury.

The case of *Loewe* v. *Lawlor*, 208 U. S. 274, 28 Sup. Ct. 301, 52 L. Ed. 488, 13 Ann. Cas. 815, and *Lawlor* v. *Loewe*, 235 U. S. 522, 35 Sup. Ct. 170, 59 L. Ed. 341, known as the Danbury Hatters' case, was twice before the United States Supreme Court. In this case the defendants were members of the United Hatters of North America and also of the American Federation of Labor. The association by name was not a party defendant, but a large verdict in damages was recovered, and the recovery sustained on appeal. The case of *Eastern States Retail Lumber Dealers' Association* v. *United States*, 234 U. S. 600, 34 Sup. Ct. 951, 58 L. Ed. 1490, L. R. A. 1915A, 788, was a case brought by the United States for a violation of the act of July 2, 1890, against various lumber associations composed largely of retail lumber dealers in New York, New Jersey, Pennsylvania, Connecticut, Massachusetts, Rhode Island, Maryland, and the District of Columbia, and the officers and directors of the associations. No objection to suing the defendants in the name of the association was made in this case. The case of the *United States* v. *Workingmen's Amalgamated Council* (C.

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C.) 54 Fed. 994, 26 L. R. A. 158, was cited with approval by the Supreme Court of the United States in *Loewe* v. *Lawlor*, 208 U. S. 301, 28 Sup. Ct. 301, 52 L. Ed. 488, 13 Ann. Cas. 815. No objection was made that this suit was against the association by name. The result of what has been said is that the United Mine Workers of America and the local unions were properly sued in the name of the association. Whether they are in fact liable in this action is another question, not now to be considered.

[7] [3] We now come to the question as to whether the complaint states a cause of action. The complaint is necessarily voluminous as it describes an alleged conspiracy. A copy appears in the margin.[a] It will not be necessary or convenient to restate in this opinion the allegations of the complaint, as they are fully stated in the copy set out in the margin. A careful consideration of the same has led to the conclusion that it sufficiently alleges a combination and conspiracy in restraint of interstate trade and commerce between the defendants, that the acts alleged to have been committed by them in pursuance of said combination and conspiracy resulted in damage to some or all of the coal companies, and that when these acts were committed the operating coal companies were engaged in interstate trade and commerce in the mining and shipment of coal. It is objected that the complaint fails to show that the plaintiffs were engaged in interstate trade or commerce at the time of the commission of the alleged wrongs, or that the plaintiffs have suffered damages to interstate trade or commerce by reason of defendant's acts. The complaint alleges that at the time the receiver was appointed and for many years prior thereto certain of the coal companies were engaged in the production, loading, and shipment of coal for interstate trade and commerce from coal lands located in Sebastian County, Ark. It is claimed that, as the complaint does not allege the date when the receiver was appointed, it is impossible to determine when the coal companies were engaged in interstate commerce in relation to the mining and shipment of coal. This contention is without merit.

[a] See note at end of case.

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It is not claimed that the causes of action have been barred by the statute of limitations, and the complaint fully shows that 75 per cent of all coal mined and shipped was shipped to customers outside of the State of Arkansas. It is alleged in the complaint that by reason of the combination and conspiracy pleaded, and the acts done in pursuance thereof, such companies have suffered great loss and injury to their business and property, in the sum of $427,820.77. This allegation is followed by an itemized statement of the character and amount of damage. Whether they have been damaged as alleged only a trial can determine. Certainly on general demurrer the complaint must be held to allege some damage.

[4] Some of the coal companies were not actually engaged in interstate commerce at the time the alleged acts were committed by the defendants; but they were preparing to do so, and were prevented from so doing, as they allege, by the wrongs of the defendants. It was held in *Pennsylvania Sugar Refining Co.* v. *American Sugar Refining Co. et al.*, by the Circuit Court of Appeals of the Second Circuit, 166 Fed. 254, 92 C. C. A. 318, that:

"A conspiracy to prevent a manufacturer who procures his supplies and disposes of his products by means of interstate commerce from engaging in business at all necessarily places restraints upon such commerce. Its flow is restricted and interrupted. The importation and exportation of articles of commerce are directly prevented, and none the less so because the conspiracy may be of so wide a scope as to interfere with interstate commerce also."

[8] To the same effect is *Thompsen et al.* v. *Union Castle Mail Steamship Co. et al.*, 166 Fed. 251, 92 C. C. A. 315 (2d Circuit).

[5] It is next objected that the alleged wrongs of the defendants do not constitute an interference with interstate trade or commerce. We do not think, since the case of *Loewe* v. *Lawlor*, 208 U. S. 274, 28 Sup. Ct. 301, 52 L. Ed. 488, 13 Ann. Cas. 815; and *Lawlor* v. *Loewe*, 235 U. S. 522, 35 Sup. Ct. 170, 59 L. Ed. 341, it can be said that this can be considered an open question. In rendering the opinion of the Supreme Court when the case was last before it, Justice Holmes said:

"The substance of the charge is that the plaintiffs were hat manufacturers who employed non-union labor; that the defendants were

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members of the United Hatters of North America and also of the American Federation of Labor; that, in pursuance of a general scheme to unionize the labor employed by the manufacturers of fur hats (a purpose previously made effective against all but a few manufacturers), the defendants and other members of the United Hatters caused the American Federation of Labor to declare a boycott against the plaintiffs, and against all hats sold by the plaintiffs to dealers in other States and against dealers who should so deal in them; and that they carried out their plan with such success that they have restrained or destroyed the plaintiff's commerce with other States.

This charge being proven, the learned justice further said (235 U. S. 534, 35 Sup. Ct. 172, 59 L. Ed. 341):

"We agree with the Circuit Court of Appeals that a combination and conspiracy forbidden by the statute were proved, and that the question is narrowed to the responsibility of the defendants for what was done by the sanction and procurement of the societies above named."

The Sherman Act has been so frequently and recently construed by the Supreme Court as to require no extended discussion now. *Standard Oil Co.* v. *United States*, 221 U. S. 1, 31 Sup. Ct. 502, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912D, 734; *United States* v. *American Tobacco Co.*, 221 U. S. 106, 31 Sup. Ct. 632, 55 L. Ed. 663; *United States* v. *St. Louis Terminal*, 224 U. S. 383, 32 Sup. Ct. 507, 56 L. Ed. 810; *Standard Sanitary Manufacturing Co.* v. *United States*, 226 U. S. 20, 33 Sup. Ct. 9, 57 L. Ed. 107; *United States* v. *Union Pacific R. R. Co.*, 226 U. S. 61, 33 Sup. Ct. 53, 57 L. Ed. 124; *United States* v. *Reading Co.*, 226 U. S. 324, 33 Sup. Ct. 90, 57 L. Ed. 243; *United States* v. *Patten*, 226 U. S. 525, 33 Sup. Ct. 141, 57 L. Ed. 333, 44 L. R. A. (N. S.) 325; *Nash* v. *United States*, 229 U. S. 373, 33 Sup. Ct. 780, 57 L. Ed. 1232; *Straus* v. *American Publishers' Association*, 231 U. S. 222, 34 Sup. Ct. 84, 58 L. Ed. 192, L. R. A. 1915A, 1099, Ann. Cas. 1915A, 369; *Eastern States Lumber Association* v. *United States*, 234 U. S. 600, 34 Sup. Ct. 951, 58 L. Ed. 1490, L. R. A. 1915A, 788. As was said in the case last cited:

"It broadly condemns all combinations and conspiracies which restrain the free and natural flow of trade in the channels of interstate commerce."

It is next contended that, if plaintiffs have suffered damage to their interstate commerce or trade, such damage is indirect, incidental, and too remote to entitle them to recover

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in this action. As against a general demurrer the complaint, as we have stated, is good so far [9] as the question of damages is concerned. The law provides that any person who shall be injured in his business or property rights by reason of anything forbidden or declared unlawful by the act shall recover threefold the damages by him sustained. It is the source of the injury, and not the character of the property injured, which constitutes the test of recovery. Assuming that an unlawful conspiracy or combination in restraint of interstate commerce exists, then, if any person is injured by it in his business or property rights, he may recover. *Chattanooga Foundry & Pipe Works* v. *City of Atlanta*, 203 U. S. 390, 27 Sup. Ct. 65, 51 L. Ed. 241. The complaint alleges actual interference with and destruction of cars of common carriers to be used in interstate commerce for the transportation of coal. This fact alone would show an interference with interstate commerce. *Steers* v. *United States*, 192 Fed. 1, 112 C. C. A. 423; *United States* v. *Reading Co.*, 226 U. S. 324, 33 Sup. Ct. 90, 57 L. Ed. 243.

In *Swift* v. *United States*, 196 U. S. 375, 25 Sup. Ct. 276, 49 L. Ed. 518, it was said:

"Although the combination alleged embraces restraint and monopoly of trade within a single State, its effect upon commerce among the States is not accidental, secondary, remote, or merely probable. On the allegations of the bill the latter commerce no less, perhaps even more, than commerce within a single State, is an object of attack. * * * Moreover, it is a direct object. It is that for the sake of which the several specific acts and courses of conduct are done and adopted."

In *United States* v. *Reading Co.*, 226 U. S. 324, 33 Sup. Ct. 90, 57 L. Ed. 243, it was said:

"The mere fact that the sales and deliveries took place in Pennsylvania is not controlling when, as here, the expectation was that the coal would, for the most part, fall into and become a part of the well-known current of commerce between the mines and the general consuming markets of other States. * * * The purchase and delivery within the State was but one step in a plan and purpose to control and dominate trade and commerce in other States for an illegal purpose."

After considering the complaint and the decisions of the Supreme Court and other courts, we can come to no other conclusion than that the case made by the complaint falls

within that class of restraints of trade aimed at compelling third parties and strangers involuntarily not to engage in the course of interstate trade, except on conditions that the combination imposes, and therefore violates the act of July 2, 1890.

In *United States* v. *Patten*, 226 U. S. 525, 33 Sup. Ct. 141, 57 L. Ed. 333, 44 L. R. A. (N. S.) 325, it was said:

"Section 1 of the act, upon which the counts are founded, is not confined to voluntary restraints, as where persons engaged in interstate trade or commerce agree to suppress competition among themselves, but includes as well involuntary restraints, as where persons not so engaged conspire to compel action by others, or to create artificial conditions, which necessarily impede or burden the due course of such trade or commerce and restrict the common liberty to engage therein."

[10] Judgment below reversed and the case remanded, with instructions to overrule the demurrer, and allow defendants to answer the complaint, if they shall be so advised.

NOTE.

"3. That the Hartford Coal Company, the Mammoth Vein Coal Company, the Mammoth Vein Coal Mining Company, the Coronado Coal Company, and the Prairie Creek Coal Mining Company, and each and every one of them, were at the time of the appointment of said receiver and for many years prior thereto operating coal companies engaged in the production, loading, and shipment of coal for interstate trade and commerce, and the coal lands of each of said companies from which said coal was mined and shipped were located in Sebastian County, in the State of Arkansas.

"4. That prior to the year 1914 and before the commencement of the difficulties hereinafter set forth, the Hartford Coal Company employed about seventy men, the Mammoth Vein Coal Company employed about three hundred men, the Coronado Coal Company employed about two hundred and fifty men, and the Prairie Creek Coal Mining Company employed about two hundred and fifty men, and that all of said operatives were employed by said respective companies in connection with the production, loading, and shipment of coal in or about their respective mines for interstate trade and commerce, and that the value of the annual shipments and sale of coal by said mines, respectively, exceeded the following:

Hartford Coal Company	$50,000
Mammoth Vein Coal Company	120,000
Coronado Coal Company	175,000
Prairie Creek Coal Mining Co	120,000

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"That seventy-five per cent of the coal shipped by each of said mines was sold and shipped to customers outside of the State of Arkansas in the ordinary course of interstate trade and commerce.

"That prior to April, in the year 1914, the Mammoth Vein Coal Mining Company entered into a written contract with the Mammoth Vein Coal Company and the Prairie Creek Coal Mining Company wherein and whereby it agreed to operate and produce coal from mines of the said Mammoth Vein Coal Company and the Prairie Creek Coal Mining Company for and in behalf of said companies, said Mammoth Vein Coal Company and said Prairie Creek Coal Mining Company continuing to sell and ship the coal so produced from their said respective mines as theretofore, the Prairie Creek Coal Mining Company selling and shipping the coal mined by said Mammoth Vein Coal Mining Company from the mines formerly operated by the Prairie Creek Coal Mining Company, and the Mammoth Vein Coal Company continuing to sell and ship the coal produced by the Mammoth Vein Coal Mining Company from the mines formerly operated by said Mammoth Vein Coal Company, and that 75 per cent of the output of each of said mines was so produced, loaded, and shipped for customers outside of the State of Arkansas in the course of interstate trade and commerce.

"That the Denman Coal Company, the Bache-Denman Coal Company, the Sebastian County Coal Company, the Mammoth Vein Coal Company, and the Mammoth Vein Royalty Company, and each and every one of them, were financially interested in one or more of the aforesaid operating companies, either through contracts or the lease of coal lands on which said operating coal companies were working, or through the ownership of all or the majority of the stock of said operating companies.

"5. That the mining of coal, as conducted by said operating companies, is not a manufacturing business, but includes only the taking of the coal in its natural condition from the earth and loading it on the cars of common carriers for transportation by them over their lines to the respective consignees, and that about 75 per cent of the shipments of said operating companies were made by common carriers on interstate trains to points outside of the State of Arkansas, including the States of Oklahoma, Kansas, Nebraska, Texas, and Missouri; that among the employés, which each of said companies required for the conduct of said interstate trade and business, were those who placed [11] the cars of interstate carriers in convenient places on the side tracks of said carriers for loading for interstate shipment, those who loaded said cars of common carriers on said tracks with coal for shipment to points outside of the State, and those who placed said cars so loaded for points outside of the State in their proper place on the tracks of said carriers where they could be hauled by the engines of said carrier over the tracks of said carriers and attached to interstate freight trains for trans-

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portation to points outside of the State, and that the work of shipping coal, when hereinafter mentioned, includes said loading and placing of said cars on the tracks of said carriers; that the ownership and operation of said mines, and the taking and producing of coal therefrom, was but one step in the said interstate trade and business of said companies, and that said companies were dependent for the profitable conduct of their business upon the trade which it secured from customers outside of the State of Arkansas, and owned and operated said mines in said State of Arkansas for the purpose of carrying on said interstate trade and business, and would not have purchased or attempted to operate said mines except for the purpose of carrying on said interstate trade and business, and one of the principal assets of said companies was their good will, trade, and business with customers outside of the State of Arkansas, and said companies employed agents and salesmen in other States in order to protect, preserve, build up, and increase said interstate trade, business, and good will.

* * * * *

"11. That said United Mine Workers of America and the combination of the defendants hereinafter described divides all coal mines in the several States of the United States into two classes, one class being called 'union' or organized mines, because they are operated under an agreement with the United Mine Workers of America, or one of its district branches, to employ none but members of that union in or about the work of producing, loading, and shipping coal and to comply with all the rules and regulations of the United Mine Workers of America and its district branch having jurisdiction over the respective mines in accordance with their geographical location; the second group of said mines as so designated and classified by the defendants are known as non-union, unorganized, or 'open-shop' mines, because they refuse to make such agreement with the defendants' combination to employ only members of the United Mine Workers of America exclusively, although many of them do not discriminate against or refuse to employ any person on the ground that he is a member of said union. That the coal produced by said union mines is hereinafter described or designated as union coal, and the coal produced by the unorganized, non-union, or 'open-shop' mines is at times hereinafter designated as non-union coal.

"12. That owing to the restrictions and unreasonable regulations which the United Mine Workers of America imposes on all union or organized mines, said mines are conducted wastefully and inefficiently, and the cost of production and the selling price of union coal is thereby unreasonably and unnecessarily enhanced, and cannot successfully compete with the products of non-union mines throughout the course of interstate trade and commerce, and it is because of this fact, and to protect said union mines against said non-union competition in coal of the lower selling price, that the United Mine Workers

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of America and those acting in conjunction with them have divided all mines in the United States into two classes, to be designated respectively as union mines or non-union mines, in order that they may more readily and effectively prevent and restrain all interstate trade and competition in the products of non-union mines.

"13. That, except for the anthracite coal mines in the State of Pennsylvania, practically the entire business of mining and shipping coal in the United States is done by what is known as bituminous mines located in the States of Washington, Wyoming, Utah, and Montana in the Northwest; Illinois, Ohio, Indiana, and Michigan in the northern Middle States; Iowa, Colorado, New Mexico, Kansas, Missouri, Oklahoma, Arkansas, Texas, Kentucky, Tennessee, and Alabama in the Middle and Southern States; and Pennsylvania, Virginia, West Virginia, and Maryland in Eastern States; that each and every one of the bituminous mines in the several States above mentioned is engaged in or subject and liable to competition in the course of interstate trade, from the [12] mines in one or more of the other States above named, and nearly every one of said mines is subject to competition of the mines of each and every one of the several States above named in reaching or attempting to reach different markets of the United States in various industrial centers in different States through the course of interstate trade made possible by transportation of common carriers from one State to another.

"14. That the mines for which the plaintiff is acting as receiver, when in operation, compete directly with the mines of Illinois, Kentucky, Alabama, New Mexico, Colorado, Kansas, Oklahoma, and the other mines of Arkansas for the markets of Louisiana, Texas, Oklahoma, Nebraska, Kansas, Missouri, Iowa, and Minnesota, and are subject to the competition of said mines in endeavoring to reach the various markets of other States through the channels of interstate trade and commerce. That the mines of Illinois sell coal through the course of interstate trade and commerce to markets in Louisiana, Texas, Missouri, Nebraska, Kansas, and other States, and the operating companies for which plaintiff, Dowd, is acting as receiver, sold coal through the course of interstate trade and commerce to purchasers in said markets and States, and thereby entered into intersate competition with said mines of Illinois in said States, and others, and are subject to and affected by the interstate competition of said mines and others in many other States. That, except for the unlawful interference of the defendants hereinafter set forth, each of said mines would have engaged in interstate competition with the said mines of other States as aforesaid in the year 1914.

"15. That all of said coal mines of Illinois, Ohio, Indiana, Wyoming, Michigan, Missouri, Iowa, Texas, Arkansas, and Oklahoma are union, and part of the bituminous mines of Pennsylvania, Kentucky, and West Virginia are union, and that said mines of Colorado, New Mexico, Alabama, Virginia, and Tennessee are non-union or unorgan-

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ized; that the annual output of bituminous coal in the United States is a little less than 500,000,000 tons, of which the State of Pennsylvania produces over one-third, the States of Ohio, Illinois, and Indiana produce over one-fifth, and the State of West Virginia produces about one-seventh; that at least 60 per cent of the entire production of bituminous coal in the aforesaid States of the United States is produced by the so-called union or organized mines; that if the attempts of the United Mine Workers and those working in conjunction with them in the unlawful conspiracy hereinafter set forth are successful in carrying out their conspiracy to unionize all the bituminous coal mines of Pennsylvania, West Virginia, Virginia, and Colorado as hereinafter set forth, then about 90 per cent of the bituminous coal produced in the United States which enters into interstate trade and commerce will be coal produced by the so-called union mines, and if the United Mine Workers of America were successful in all the attacks which it has made in different districts upon non-union mines in furtherance of said unlawful conspiracy, the said combination would have substantially a complete monopoly of interstate trade and commerce in coal in the United States and the amount of non-union coal which entered into interstate commerce would be negligible.

"16. That the United Mine Workers of America, the defendants, and many other persons to the plaintiffs unknown, now are, and for many years past have been, engaged in an unlawful combination and conspiracy, as hereinafter more fully set forth, in unlawful restraint of trade and commerce in coal among the different States of the United States, and through means whereof are unlawfully attempting to monopolize and are monopolizing said trade and commerce; that in furtherance of said unlawful combination and conspiracy, the defendants, the United Mine Workers of America and those confederated together with them in said unlawful scheme, have combined and conspired together to exclude and drive out of interstate trade and commerce, and to restrain and prevent all interstate trade and commerce in, any and all coal produced, loaded, and shipped by so-called non-union and unorganized mines, by hampering, preventing, and interfering with the production, loading, and shipment of coal for interstate commerce in any of the coal-mining States by any so-called unorganized or non-union mines, so that it cannot become a subject or commodity of interstate trade and commerce, and cannot enter into interstate competition with the products of so-called union or organized [18] mines located in divers States, and to further carry out said conspiracy by hampering and interfering with the production, loading, and shipment for interstate trade and commerce by said non-union or unorganized mines in any and all the several States where said mines are or may be located, with the purpose and intent of increasing the cost of production, loading, and shipment of said commodities so destined for interstate trade and commerce, and the resulting selling price thereof in the markets of

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the different States reached by said interstate shipments, so that said commodities cannot successfully compete in said markets with the coal produced, loaded, and shipped by the so-called union or organized mines working under agreement with said unlawful combination in the several States where located.

"17. That one of the objects of said unlawful combination and conspiracy in restraint of interstate trade is to monopolize the trade or occupation of mining coal for the members of the United Mine Workers of America and prevent the employment of non-union men in any part of the United States at the trade or craft of mining coal, and prevent the products of the labor of non-union mines from becoming subjects or commodities of interstate trade and commerce, in order thereby to more effectually compel them to abandon the trade or vocation of coal mining or become members of the said United Mine Workers of America, and thereby to secure complete monopoly and unification in control and management, so far as labor is concerned, of all competing mines in all parts of the United States as has already been achieved by said combination in many States as aforesaid.

"18. That the scope and object of said illegal scheme is to suppress and destroy the business of all non-union and unorganized mines whose products enter into interstate trade and by various means to prevent any mining company from engaging in the business of selling coal for interstate trade as an unorganized mine and prevent any of the so-called union or organized mines from commencing operations as a non-union or unorganized mine, and thus by such suppression, obstruction, and destruction of the business of any of the independent and competing mines in the several States which are operating or may hereafter operate on a non-union or unorganized basis, to completely monopolize interstate trade and commerce for union coal produced under the domination of the United Mine Workers of America, and maintain the price of said union coal in interstate commerce by protecting it from interstate competition of coal which but for said combination would be mined by the more efficient non-union mines.

"19. That the object and purpose of said combination in extending its domination and control over separate and competing mines in different States, which in the absence of said unlawful combination would be engaged in interstate competition with each other, and the sole object and purpose of said combination in destroying or preventing interstate shipments of coal by all mines in any of the coal-mining States, which do not acquiesce in its control and domination, is to prevent any coal not produced by union mines from becoming a subject of interstate commerce and entering into interstate competition with the products of so-called union mines and to further carry out agreements and understandings hereinafter described, between the proprietors of the so-called union mines and said unlawful combina-

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tion to the effect that the defendants and others acting in conjunction with them in said unlawful conspiracy will protect interstate trade and business of said union mines from the competition of unorganized mines by employing all the means available to organized labor to prevent the production, loading, and shipment of coal for interstate trade and commerce by unorganized mines.

"20. That in furtherance of said unlawful combination and conspiracy to unduly restrain interstate trade and commerce, and to exclude the products of all unorganized mines and non-union miners from interstate trade and commerce, the United Mine Workers of America working through their district organizations, and the defendants, have ordered and coerced strikes of employés employed by unorganized mines in different States and by violence, intimidation, mobs, and riots prevented the employment of any miners in said mines for production, loading, or shipment of coal for interstate commerce, and by dynamite and arson and other unlawful means have destroyed the facilities of said unorganized mines for producing, loading, and shipping coal for [14] interstate commerce, and by divers other means have hampered, interfered with, prevented, and attempted to unduly enhance the cost of producing, loading, and shipping of coal by said unorganized mines for interstate commerce, so that it would no longer be marketable as an article or commodity of interstate trade and commerce in competition with union coal.

"That each and every one of the acts hereinafter set forth, wherein and whereby the production, loading, and shipment of coal by the plaintiffs, or any other unorganized mines, was destroyed, interrupted, hampered, or interfered with, were done and carried out in furtherance of the aforesaid combination and conspiracy to unduly and directly restrain interstate trade and commerce, and with the intent, purpose, and effect thereof as hereinabove set forth, and with the purpose or effect of inducing and forcing persons and corporations formerly engaged in interstate trade as non-union mines to refrain therefrom until such times as they would carry on said business as union mines upon terms dictated by said combination and conspiracy.

"21. That in furtherance of the combination and conspiracy to restrain interstate trade and commerce in bituminous coal and to prevent any non-union coal from entering into interstate trade and commerce, the United Mine Workers of America and its district branches have from time to time since 1898 entered into negotiations, understandings, and agreements with the operators of union mines in the States of Ohio, Illinois, and Indiana and other States, wherein and whereby it was understood and agreed that in consideration of said operators agreeing to or continuing to operate union mines, the said United Mine Workers of America, the defendants, and those working in conjunction with them in said unlawful scheme and purpose, would by strikes and the usual unlawful means which invariably accompany all strikes conducted

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by the United Mine Workers or any of its branches, prevent the production and shipment of bituminous coal by all so-called non-union and unorganized mines in other States whose products come into interstate competition with the products of said union mines through the course of interstate trade and commerce, and that said agreement and understanding required said United Mine Workers and its said branches to use all means in its power to interfere with and prevent interstate commerce in bituminous coal by all unorganized mines, and by all competitive mines which should thereafter become non-union or unorganized, and that the combination and conspiracy herein described to interfere with and destroy the business of the mines for which plaintiff, Dowd, is acting as receiver, and all acts in furtherance thereof hereinafter described were done in pursuance of said illegal arrangement, contracts, and understandings between the said United Mine Workers and said union operators to destroy and prevent interstate trade and commerce in bituminous coal from unorganized fields by destroying or interfering with the facilities of said unorganized mines for the production and shipment thereof.

"22. That in furtherance of said illegal combination and conspiracy to restrain and prevent interstate trade and commerce in bituminous coal and drive all non-union coal out of interstate trade and commerce, the said United Mine Workers of America and those working in conjunction with them did at various times since 1898 embark and engage upon a general campaign and crusade to prevent all the non-union bituminous mines in the State of Pennsylvania, which were producing about 12 per cent of the entire output of bituminous coal in the United States, from engaging in interstate trade and commerce in non-union coal, by ordering a strike of employés in said mines, and through violence, intimidation, and threats preventing the employment of any operatives for the production, loading, and shipment of coal, and by the use of fire and explosives destroying the facilities of said mines for the production, loading, and shipment of said coal.

"And that in or about the year 1911 said United Mine Workers and those acting in conjunction with them did undertake to and did employ said means in furtherance of said unlawful design against certain non-union mines in Westmoreland and Irwin districts in the State of Pennsylvania, known as the Westmoreland and Irwin mines, in order to prevent said mines from engaging in interstate trade and commerce in non-union coal.

"That in furtherance of said illegal combination and conspiracy to restrain [15] trade among the several States in coal, as hereinabove set forth, said United Mine Workers and those acting in conjunction with them did, in the year 1913, enter into a general campaign and crusade against non-union mines in the State of Colorado, and agreed to and did order a strike of said employés of said various competing miners of said State, and by violence, threats, and intimidation

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did prevent said mines from procuring further employés to produce, load, or mine coal for the interstate trade and commerce of said mines, and did by the use of fire and explosives destroy the facilities of said mines for the production, loading, and shipment of coal for interstate trade and commerce, in order thereby to destroy interstate trade and commerce in non-union coal.

"That at various times since 1906, and in furtherance of said unlawful scheme to restrain trade in bituminous coal among the several States, said United Mine Workers and those acting in conjunction with them did engage in a general campaign and crusade to destroy interstate trade and business of the non-union bituminous mines in West Virginia by ordering strikes of the employés of said companies engaged in the work of producing, loading, and shipment of coal for interstate trade and commerce, and by violence, threats, and explosives, and by preventing the employment of other operatives to carry on said work, and by fire and explosives destroying the facilities of said mines for the production, loading, and shipment of said coal for interstate trade and commerce; and that said United Mine Workers and those working in conjunction with them have from time to time on other occasions employed all of said means to destroy the business of all of said non-union companies in Pennsylvania, West Virginia, Colorado, and other States, in order thereby to prevent said companies from shipping non-union coal for interstate trade and commerce.

"23. That early in the year 1914 all said companies for which the plaintiff, Dowd, is acting as receiver decided that said operating companies should be conducted on a non-union or open-shop basis, without discrimination against any employé on the ground that he was or was not a member of any union, and that about the middle of March, 1914, the Mammoth Vein Coal Company and the Prairie Creek Coal Mining Company closed down their said mines and discontinued operation as union mines, preparatory to reopening upon the non-union or open-shop basis in the month of April, 1914; that the Hartford Coal Company had not been in operation for over a year previous thereto, but it was the plan and intention of said company to also reopen upon the non-union or open-shop basis as soon as it became expedient so to do, or at least in the summer of 1914; that the Coronado Coal Company continued operation as a union company until April 18, 1914, when its employés were ordered out on a strike by the defendants in furtherance of the unlawful conspiracy herein set forth, because some of the individuals interested in said mines that were going to be operated as open shops had also financial interests in said Coronado Coal Company and might use their profits from said company to carry on interstate commerce in non-union coal from said other mines; that before said strike took place, and early in the year 1914, as aforesaid, it was the intention of the said Coronado Coal Company and the persons and corporations financially interested in it that said

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company should be placed upon the non-union or open-shop basis of operation as soon as expedient, or at least by the summer of 1914; that said plan of operation for said mines was in part to be carried out by having the Mammoth Vein Coal Mining Company operate the miles of the Mammoth Vein Coal Company and the Prairie Creek Coal Mining Company under its written contract described in paragraph marked '4' herein.

"24. That in the year 1914 each of said operating companies for which the plaintiff, Dowd, is acting as receiver had made preparations to do a large and profitable business with dealers in coal in other States, and to renew, manage, and conduct said interstate trade and commerce upon a non-union and 'open-shop' basis, and the condition of the market outside of the State of Arkansas in which said companies would sell their said coal, and the condition of the business of said companies was such as to warrant the full belief that the ensuing season would be a profitable one to said companies, and that in the year 1914, when the defendants undertook to destroy the business of said [16] operating companies, for which the plaintiff, Dowd, is now acting as receiver, some of said operating companies had actually commenced, and were engaged in carrying on, said interstate trade and business, and enjoying said interstate good will, and were shipping non-union coal to customers in other States in the course of interstate trade and commerce, and the rest of said operating companies were prepared to commence and renew their interstate trade and business, and were intending to renew said interstate trade and business on a non-union basis.

"25. That at all times after April 1, 1914, the defendants and those acting in conjunction with them, in furtherance of the unlawful conspiracy hereinafter set forth, well knew of said intention, plans, and costly preparations of said companies, persons, and corporations in control thereof to operate each and every one of said mines in the future upon the open-shop or non-union basis, and to sell and ship non-union coal in interstate commerce in competition with union mines, as soon as possible, and that all of the acts hereinafter described, which were done by the defendants and those acting in conjunction with them to injure and destroy the business and property of said companies, were done in furtherance of said unlawful scheme and conspiracy to prevent interstate trade and commerce in bituminous coal produced, loaded, or shipped by so-called non-union or open-shop mines.

"26. That in April, 1914, and at various times thereafter, in furtherance of said plans to have all said companies engaged in interstate trade as non-union mines, some of said operating companies for which plaintiff, Dowd, is acting as receiver began to operate their said mines on an open-shop basis, or as a non-union or unorganized mines, and from time to time in the year 1914 employed large numbers of men engaged respectively in the work of mining, loading, and

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shipping coal for interstate trade and commerce, preparatory to employing additional miners and opening additional mines for the purpose of carrying on an interstate trade and commerce on a still larger scale, and preparatory to having all of said operating companies do likewise. That none of the said miners so employed belonged to, or had any connection or association with, the United Mine Workers of America, or any of its district branches, or any of the defendants, but that the defendants, the United Mine Workers of America and those acting in conjunction with them, in furtherance of their combination and conspiracy to drive non-union coal out of interstate trade and commerce, and to restrain and prevent interstate trade and commerce therein, and in furtherance of their understanding with the proprietors of union mines competing with said mines, combined and conspired together, in furtherance of said conspiracy, to ruin and destroy the interstate trade and commerce of said mines, and to prevent them from commencing or engaging or continuing therein, by interfering with and preventing the production, loading, and shipment of coal for interstate commerce by said mines, and in furtherance of said combination and conspiracy they agreed upon and did the following acts: By threats, intimidation, violence, and unlawful assemblies, they drove and frightened away all of the men employed by said mines at the work of mining, loading, and shipping coal for interstate trade and commerce, including those men employed at the work of placing cars of interstate carries at the proper place on the tracks of said carriers where they could be loaded with coal for shipment outside of the State, and including those men employed in loading said cars of the common carriers, and those who placed the cars after loading upon the proper part of the tracks of the common carrier where they could be taken up by the interstate trains of said carriers for transportation to points outside of the State, and by threats, violence, murder, mobs, and riots prevented the said companies from employing or obtaining for employment any other operatives to load said cars of interstate carriers, and to manipulate and place said cars before and after loading for interstate transportation in their proper place on the tracks of the carrier, and by the same unlawful methods prevented said companies from employing or obtaining for employment any miners whatsoever to perform any of the work of mining, loading, and shipping coal for said mines, and by the use of fire, dynamite, and other explosives they did destroy the structures and other valuable facilities of said mines for the production, loading, and shipment of coal for interstate trade and [17] commerce, and did destroy the cars of interstate carriers, which were stationed at or about the mines waiting to be loaded with interstate shipments, and destroyed cars of said carriers and shipments already loaded thereon to be hauled away by interstate carriers for transportation to consignees outside of the State of Arkansas, and destroyed the business of other concerns in which the same

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persons were interested, in order to impoverish said persons and prevent their carrying on said non-union coal-mining business. That by said unlawful means said defendants and those acting in conjunction with them prevented any of said companies from engaging or continuing to engage in interstate trade and commerce; and the defendants well knew and intended that the destruction of the coal mines of said operating companies located in Sebastian County, Arkansas, and their interference with the operations thereof, would result in the destruction of the interstate trade and commerce of said companies, and the defendants destroyed said mines for the express purpose of entirely destroying and ruining said interstate trade and business. That none of the defendants or any one acting in conjuction with them had any interest or object in destroying said property and interfering with the operation of said mines as aforesaid, except in so far as said destruction and interference prevented the sale and shipment of coal by the said companies in competition with union mines in which said combination was interested, and their primary and direct object in so doing was to destroy the interstate trade and commerce of said companies, because it constituted 75 per cent of the trade and commerce conducted by them, and that the destruction of the working organization and production facilities of the said companies was but a step in a scheme and purpose to destroy interstate trade and commerce in non-union coal, and prevent it from coming into competition with union coal in the course of interstate trade and commerce.

"27. That except for the unlawful combination and conspiracy of the defendants, and the acts done in furtherance thereof as aforesaid, the said Hartford Coal Company, the Mammoth Vein Coal Company, the Coronado Coal Company, the Prairie Creek Coal Mining Company, and the Mammoth Vein Coal Mining Company would have, long prior to the commencement of this action and in a short time, secured employés to man their mines and engage in the work of producing, loading, and shipping coal for interstate trade and commerce, and would be non-union and unorganized mines have successfully shipped coal to the amount of over $600,000 annually in the aggregate, and would have been able to realize a large profit thereon.

"28. That by reason of said combination and conspiracy of the defendants in restraint of interstate trade and commerce, and the acts done in furtherance thereof to injure and destroy the business of the said companies for which the plaintiff, Dowd, is acting as receiver, the said companies have suffered great loss and injury to their said business and property, in the total sum of $427,820.77, and that said damages are more fully itemized as follows. * * *"

Syllabus.

ALASKA S. S. CO. *v.* INTERNATIONAL LONGSHOREMEN'S ASSN. OF PUGET SOUND, ET AL.

(District Court, W. D. Washington, N. D. September 5, 1916.)

[236 Fed. Rep. 964.]

CONSPIRACY 1—WHAT CONSTITUTES.—A conspiracy is a combination of two or more persons by concerted action to do an unlawful thing, or to do a lawful thing in an unlawful manner.[a]

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 1–5; Dec. Dig.—1.]

For other definitions, see Words and Phrases, First and Second Series, Conspiracy.]

CONSPIRACY 2—NATURE OF CONSPIRACY—DEFENSES.—No formal agreement is necessary to a conspiracy, a tacit understanding being sufficient; and it is not essential that each conspirator have knowledge of the details, the means to be used, or that the agreement be enforceable.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. § 2; Dec. Dig.—2.]

CONSPIRACY 13—ACTS OF AGENTS—LIABILITY OF PRINCIPALS.—The acts of agents and employes in furtherance of a conspiracy are the acts of the principal.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. § 14; Dec. Dig.—13.]

TORTS 10—STRIKES—PICKETS.—Where a picket around an employer's place of business is established by union strikers, the picket is the agent of the union, and efforts to dissuade others from accepting employment offered by the former employer should go no further than peaceable pursuasions and inducements.

[Ed. Note.—For other cases, see Torts, Cent. Dig. § 10; Dec. Dig.—10.]

TORTS 10—STRIKES—ORGANIZATION—RIGHTS OF TRADE-UNIONS.—Laborers may combine, forming unions to protect their rights, and they have the right to persuade others, when they have gone on strike, not to work for the employer; such rights being given under the freedom of action guaranteed by the Federal Constitution.

[Ed. Note.—For other cases, see Torts, Cent. Dig. § 10; Dec. Dig.—10.]

TORTS 10—EMPLOYERS—RIGHTS OF.—While laborers, members of a union, may strike, and may picket their employer's business, the employer is entitled to free access to his place of business for himself and other employes, and such rights cannot be interfered with.

[Ed. Note.—For other cases, see Torts, Cent. Dig. § 10; Dec. Dig.—10.]

Statement of the Case.

INJUNCTION 101 (3)—STRIKES—INTERFERENCE BY FORCE.—Act Oct. 15, 1914, c. 323, § 20, 38 Stat. 730, declares that no restraining order or injunction shall be granted in any case between an employer and employes, or between persons employed and persons seeking employment, involving or growing out of a dispute concerning the terms or conditions of employment, unless necessary to prevent irreparable injury to property or property rights, and that no such restraining order shall prohibit any person or persons, whether singly or in concert, from terminating any employment or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceable means to do so. Em[965]ployes of complainant, a ship company, engaged as a common carrier, which also carried the mails, struck, and defendants, comprising the union of which they were members, picketed the wharves of complainant and intimidated other laborers from accepting complainant's offers of employment. Defendants threw rocks on the wharves and in other ways interfered by violence with complainant's business and access to its ships. Interstate Commerce Act Feb. 4, 1887, c. 104, § 3, 24 Stat. 380 (Comp. St. 1913, § 8565), and section 10, as amended by act March 2, 1889, c. 382, § 2, 25 Stat. 857 (Comp. St. 1913, § 8574), respectively declare that every common carrier subject to the provisions of the act shall afford reasonable facilities for the exchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers and property to and from their several lines, and that any common carrier which shall willfully omit to do any act or thing required to be done shall be guilty of a misdemeanor. *Held* that, though defendants were authorized under the statute to persuade third persons to decline complainant's offers of employment, and to refuse to deliver goods to complainant or to patronize it, their interference with complainant's transportation business by violence was unlawful and will be enjoined, as it would not only expose complainant to loss but to prosecution for violations of law.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 174, 175; Dec. Dig.—101 (3).]

TORTS 10—STRIKES—LIABILITY FOR ACTS OF UNION.—A trade union, conducting a strike, is liable for the unlawful acts of members and others associating themselves with the strikers, unless such acts be disavowed, and, in the case of members, the offenders be disciplined or expelled.

[Ed. Note.—For other cases, see Torts, Cent. Dig. 10; Dec. Dig.—10.]

In Equity. Bill by the Alaska Steamship Company against the International Longshoremen's Association of Puget Sound and others. Injunction granted.

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Bogle, Graves, Merritt & Bogle, of Seattle, Wash., for plaintiff.

Thomas B. MacMahon, of Seattle, Wash., for defendants.

NETERER, District Judge.

The complainant alleges, in substance, that it is a foreign corporation doing business in the State of Washington, and doing a common-carrier business of passengers and freight; that it owns, controls, and operates a steamship line extending from the ports of Puget Sound to divers ports in the Territory of Alaska, and at such ports in the Territory of Alaska it has connections with lines of railroads and other lines of steamships and facilities for the interchange of traffic, and that it is subject to the provisions of the act of Congress known as the "Interstate Commerce Act," and its amendments; that in the conduct of its business it employs a large number of men in and about its docks and piers, for the purpose of receiving and discharging freight, and in the handling of the passenger traffic, and that it was and is operating from Piers 2 and A in Seattle; that the defendants are citizens of Washington, domiciled in this district; that J. A. Madsen is secretary of the Longshoremen's Association, and M. E. Wright assistant secretary, and M. Myers president of the local union thereof in Seattle, known as "Local 38-12"; that George Whistler is secretary of said local union, and the defendants Smith and Conners are members and officers thereof; that on the 1st day of [966] June its employees, engaged in the handling of freight at said piers, were members of the defendant union and were known as longshoremen, and without complaint on said day all employees quit work, and thereafter submitted demands for certain concessions as to hours of service and compensation, which demands were granted, and on the 10th of June following they returned to work; that on the 22d of June, without any demand or statement of grievance, and without notice, all of said member employees again quit work and have since remained away from such service; that immediately upon the employees ceasing to labor the plaintiff, "in order to * * * discharge its duties as a com-

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mon carrier and perform its obligations under the laws of the United States," employed other workmen; that thereupon, "and at the time of the strike of June 22, 1916, the defendant association and the officers thereof, and the other defendants who are parties hereto, and other officers and members of said association to plaintiff unknown, combined and conspired with each other, and combined and conspired with other organizations, * * * to prevent the plaintiff from carrying on its business, * * * and in pursuance of such combination and conspiracy endeavored, and are endeavoring, unlawfully to force and compel the workmen now in the employ of the plaintiff to leave its service; * * * that by threats, display of numbers, jeers, and by other unlawful means" defendants intimidated and prevented, and continued so to do, the employees from remaining in plaintiff's service; that they have assaulted the employees of the plaintiff, stoned them in the streets as they approached Pier 2, and have driven away those about to enter the employment of plaintiff, and "have turned back and driven away from said piers passengers who were going thereto to take passage upon the vessels of plaintiff, and have stopped wagons carrying equipment for said vessels from entering said piers, and have forced them to drive away, so that said equipment could not be loaded upon said vessels"; and other like conduct is set forth, and it alleges the threatened destruction of the property of the complainant.

Upon motion of the complainant, based upon the verified bill, a temporary restraining order was issued on the 7th of July, and the matter set for hearing on July 15th on application for temporary injunction, and the order directed to be served upon the defendants, with notice to appear at said time and show why a temporary injunction should not be granted. At the appointed time the defendants appeared and filed answers, denying all of the charges of the complaint, and announced readiness for trial upon the merits. Upon the consent of both parties the case was set for trial on the 27th day of July, and the restraining order continued until that time. Testimony at said time was submitted on the part of the complainant and the defendants, and the cause taken under advisement, and by consent of

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both sides was continued to September 5th, the restraining order remaining in force.

The testimony shows that the International Longshoremen's Union is a voluntary association, divided into districts, each district having its organization and affiliation with the international body; that the [967] Pacific coast comprises one district, of which J. J. Foley, of San Pedro, Cal., is president, and J. A. Madsen, of Portland, Or., secretary, and that M. E. Wright, is an employe in the office of the secretary, who attends to the business of the office during the secretary's absence; that C. Conners and S. C. Smith are members of the executive board, and M. Myers, president, and George Whistler, secretary, of the Riggers' and Stevedores' Union; that the district association has series in each port, which are designated from 1 to 59, some having ceased to exist, but 40-odd local organizations are now in existence, the Pacific Coast district being known as "Local 38," and the number and series of the Seattle organization is "Riggers' and Stevedores' Local Union No. 38-12," which has a membership of 700 or 800. May 1, 1916, at a convention held at Seattle, of the district association, "Local 38," a scale of wages and hours of employment was adopted. This was to be presented to the employers for acceptance, and "it was decided to enforce a wage scale and working rules." "The men were to cease work for those firms that declined to pay the scale on June 1st, 6 a. m." On May 25th demand was presented to the complainant company "for an increase of wages and working conditions." The demand being ignored, the employees quit work on June 1st. Thereafter complainant "granted all the demands that were asked," and the men returned to work June 10th. The executive board of the defendant association negotiated the terms upon which the men returned to work with the Employers' Union of San Francisco, which also represented the Employers' Union of Puget Sound. On the 22nd day of June, without notice or further demand, the employees again quit work and have not since returned. Mr. Wright, upon inquiry, told Pierson, of complainant company:

"That the strike of the Alaska Steamship Company was not intended; that they did not have orders to strike on the Alaska

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Steamship Company, and * * * that he would have the matter straightened out by 5 o'clock that afternoon; but I never heard anything from Mr. Wright until the afternoon of the 24th, when he * * * and Barry * * * came down to Pier 2 and said that unless we could guarantee to give them all the work at the smelter they would still stay out on our vessels."

the smelter referred to being the smelter at Tacoma, with the operation of which plaintiff had nothing to do. The complainant company employed from 90 to 120 men, and Mr. Pierson, the general manager, stated that after the strike was called

"they [the strikers] gathered in front of Pier 2 and also Pier A in large numbers, sometimes more than 100, and they would stop any one that looked like a workman, question him whether they would let him go on the dock or not. Even passengers of our ships with tickets were stopped. They would stop a man, or take hold of him, and want to know where he was going, what business he had on the dock, whether he was looking for a job."

In reply to the inquiry, "Were any of the employees attacked in any way going to or from the dock?" he said, "Well, I don't know that there was any one beaten up, but they were stopped." This witness further stated that quarters were provided by complainant for the men employed in the steamer *Dolphin* at an expense to the complainant [968] of approximately $10,000 a month, and that "when we had them employed on the docks close in to the head of the dock they [employees] were stoned, not once, but dozens of times," and that immediately upon the temporary restraining order being issued all trouble ceased, and he also stated, "We did have a wagon stopped." On cross-examination, he said that he saw stones thrown, but he did not know who threw them; that no one was arrested; that no complaint was made, except to the officers on the dock; that no person could be identified, except "they were all button men mostly"; but he could not identify the button as the longshoremen's button. When asked how he knew that the defendants threw the stones, he stated:

"Because I know those men went on a strike, and they were doing everything they could to prevent us from doing business.

"Q. Aside from the stones that were thrown, that you said did no damage either to the car or to the dock, and the matches that were burned, which you did not own, nothing happened? A. No; nothing."

A Mr. Cushing was assaulted a day or two after a member of the strike committee heard him ask a third party whether he wanted work and tell this party he could obtain work at Pier 2 "and receive 50 cents an hour daytime, 75 cents overtime, and free board and room." He was assaulted by men who wore "buttons," and the witness thought they were longshoremen's buttons.

Carl King, an employee, as he was leaving the plaintiff's plant, was accosted by two men, who took hold of him and asked what he was doing, and, after stating that he was a wireless operator, was asked to produce his license. Not having it with him, he was permitted to go, after presenting a student's identification card of the University of California, of which he had been a student.

Mr. O'Connor, an employee of complainant, was assaulted on Occidental Avenue, between Main Street and First Avenue, by four men, one of whom knocked him down with brass knuckles. Three longshoremen were arrested and are awaiting trial.

George Miles, driving a truck for the Carmen Manufacturing Company, attempted to deliver a load of mattresses to complainant and was told by some of the men on strike that he "had better not go in there, and to take the load back," and thereupon returned.

John Smith, chief stevedore of complainant company, testified that a large number of longshoremen intimidated a crew employed by him on the *Admiral Evans* while she was unloading at Stacy Street Dock No. 1, by entering upon the vessel and compelling the laborers to go into the hold of the ship. Other acts were disclosed by the testimony which need not be detailed. There was a strike upon all of the docks and piers in the city of Seattle, except the port commission, which had entered into some arrangement with the strike committee, and the strike was ordered by "38–12," except as to plaintiff's docks, but was afterwards extended to these docks, and pickets were placed upon the various docks in the city of Seattle, and a strike committee and bail committee appointed.

A number of witnesses were examined on the part of the defense, in which denial is made of any participation in any

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of the acts complained [969] of, but only one member of the picketing committee was called and testified.

[1–3] A conspiracy is defined as a combination of two or more persons by concerted action to do an unlawful thing, or to do a lawful thing in an unlawful manner. *Pettibone* v. *United States*, 148 U. S. 205, 13 Sup. Ct. 542, 37 L. Ed. 419. No formal agreement is necessary. A tacit understanding is sufficient, and it is not essential that each conspirator have knowledge of the details of the conspiracy, the means to be used, or that the agreement be unenforceable. Acts of agents and employees in furtherance of the conspiracy are acts of the principals. *United States* v. *Keitel*, 211 U. S. 379, 29 Sup. Ct. 123, 53 L. Ed. 230.

[4–6] A picket may be considered an agent of a labor organization, and where a picket is established it could go no further than interviews, peaceable persuasion, and inducements; and slight violence or intimidation will have much weight with a chancellor in determining the character of a picket, or the acts of men under its direction, since a picket, under the most favorable consideration, is for the purpose of interference between one who wishes to employ and those seeking employment. No fair-minded, unprejudiced person should desire to place any obstacle in the way of the lawful operation of labor organizations, or to do any act prejudicial to such organizations. There are always found, however, some reckless and revengeful persons among the membership of such organizations, and vicious and lawless persons sometimes take advantage of labor strikes to commit acts of violence against persons and property, or to induce others to do so, for the purpose of wreaking a personal vengeance, or casting suspicion upon and creating public sympathy against strikers, so that great caution should be taken by labor organizations on declaring a strike, and those doing picket duty, to see that no rights of others, by their members, are transgressed. Courts have invariably upheld the right of individuals to form labor organizations for the protection of the interests of the laboring classes, and such right is recognized by the Unlawful Restraint and Monopoly act. Organized labor is organized capital, consisting of brains and muscle, and has as lawful a right to organize as have the

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stockholders and officers of corporations who associate and confer together with relation to wages of employes or rules of employment, or to devise other means for making their investments more profitable. Organized labor and organized capital have equal lawful rights to associate, consult, and confer with relation to wages and rules of employment. *Ames* v. *Union Pacific* (C. C.) 62 Fed. 7; *Thomas* v. *Cincinnati, N. O. & T. P. Ry. Co.* (C. C.) 62 Fed. 803. Justice Holmes, in *Vegelahn* v. *Guntner*, while sitting on the Supreme Court of Massachusetts, 167 Mass. 92, 44 N. E. 1077, 35 L. R. A. 722, 57 Am. St. Rep. 443, said:

> "If it be true that workingmen may combine with a view, among other things, to getting as much as they can for their labor, just as capital may combine with a view to getting the greatest possible return, it must be true that, when combined, they have the same liberty that combined capital has to * * * bestowal or refusal of those advantages which they otherwise lawfully control."

[970] It is not unlawful for persons to combine merely to regulate their own conduct with relation to legitimate competition, although others may be indirectly affected thereby. The right of property and liberty of action is guaranteed by the Constitution of the United States to every citizen of this country, and is not confined to political rights, but extends to activities in and about the daily business of life, whether it be of employee or employer. The laborer may organize for protection, and his privilege to work for whom and when he desires is granted, and the right of the employer to employ whom he elects at a satisfactory price is not denied, and neither can he secure more and must not accord less. The employer is also accorded the freedom of access to the place where his work is done, and when access is through a public street, unobstructed access is not inconsistent with any right striking laborers have to use such street for the lawful conduct and peaceable assembling in a lawful manner and for lawful purposes; but any person, while engaged in a lawful endeavor of advancing his interest and securing the greatest benefit in a lawful manner, must not attempt to secure such ends by infringing the rights of others, and when that is done it is the duty of the court, when the matter is properly pre-

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sented, to intervene. Courts cannot create rights, or initiate new powers or privileges, and can only define existing rights, and apply to them the recognized powers and privileges within its limitations. The creation of new rights or powers is not a judicial function. That is a matter of legislation.

The defendants had the right, if they so desired, to cease to work. Whether they had good cause or not is not for this court to say. On the other hand, the complainant had the right, upon the defendants ceasing to work, to employ whom it elected, and to be protected against overt acts of defendants against such employees, and have the unobstructed use and enjoyment of its property. The rights of the several parties, as stated, are reciprocal, and are measured by the same rule.

[7, 8] In determining the rights of the parties in this issue, consideration must be given to section 20, chapter 323, 38 Stat. at Large, page 730, which provides:

"That no restraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof, in any case between an employer and employes, or between employers and employes, or between employes, or between persons employed and persons seeking employment, involving or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application, for which injury there is no adequate remedy at law, and such property or property right must be described with particularity in the application, which must be in writing and sworn to by the applicant or by his agent or attorney.

"And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from [971] recommending, advising, or persuading others by peaceful and lawful means so to do; or from paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of value; or from peaceably assembling in a lawful manner and for lawful purposes; or from doing

any act or thing which might lawfully be done in the absence of such dispute by any party thereto; nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States."

With this provision should be considered section 3 of the Interstate Commerce Act (24 Stat. 379), which provides:

"Every common carrier subject to the provisions of this act shall, according to their respective powers, afford all reasonable * * * facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers and property to and from their several lines and those connecting therewith."

Also section 10 of the same act, as amended (25 Stat. 857), which says:

"Any common carrier * * * or any * * * agent, or person, acting for or employed by such corporation, who, alone or with any other corporation, company, person, or party, * * * shall willfully do or cause to be done, * * * or shall willfully omit or fail to do any act, matter, or thing in this act required to be done, * * * or shall aid or abet * * * such omission or failure, * * * shall be deemed guilty of a misdemeanor."

Sections 3 and 10 *supra* impose duties on complainant. with penalties attached for violation. The testimony shows that the complainant company is a carrier of interstate commerce. It likewise carries United States mail from the port of Seattle to the various ports and places in the Territory of Alaska, at which ports the commerce and mails are delivered to the various connecting lines of transportation, and as such carrier sustains a special relation to the public. It is clearly established that the defendants did coöperate and confederate together and with others for the purpose of preventing the plaintiff from carrying on its business as a carrier of interstate commerce and United States mail. It is also established that the acts done went beyond the privilege extended and license granted to defendants by section 20, *supra*, and infringed upon the rights of complainant, and that these acts are attributable to defendants. The settlement of the strike on June 1st was brought about by some of the defendants with the Employers' Union of San Francisco and of Puget Sound. They negotiated a status

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with the port commission of Seattle, and directed the strike in Seattle, if not against the complainant, against other employers of their labor upon the docks of Seattle, acting through strike committees, who were given charge of the conduct of the strike, and who appointed members to do picket duty, which strike extended to complainant's property, and was recognized by defendants and carried on by them. It further shows that strikers congregated in large numbers about the plant and place of business of the complainant company; that they jeered persons going in and out, not using any vile language, however, to or in the hearing of persons approaching the piers; that several persons employed by plaintiff were assaulted; that rocks were thrown upon the docks of complainant, where men [972] were employed, either by longshoremen or by some persons who mingled with the men on strike and must have been known to the strikers, and no action was taken to suppress such conduct or to apprehend the parties or disavow such acts; that the freedom of movement of persons going upon complainant's docks was interrupted by members of the defendant union; that these acts continued until the granting of the restraining order.

While there is no testimony that any of these acts were expressly authorized, there is no evidence that the acts were disapproved, or members disciplined or expelled. The testimony does show that the defendants did have control of the situation and did not exercise their influence or power to correct the irregularities or disavow the acts until the issuance of the temporary restraining order and service upon the defendants, when all overt acts ceased, which, considered with what defendants did do, confirms the conclusion that the acts were under the authority and within the control of defendants. When persons or parties set in motion machinery for the purpose of shaping sentiment, they cannot take the benefits, without also being burdened with responsibilities. Such parties thereby assume the burden of controlling such agency, if within their power; and if, perchance, some persons unauthorized, acting with defendants, commit unauthorized acts, it is incumbent upon the defend-

ants to show such fact, and, if committed by members under the control of the association, to disavow such acts by causing such offending members to be disciplined or expelled. The testimony before the court does not show that any attempt was made to destroy the property of the complainant, except the revenues for transportation of traffic; nor does the evidence justify the conclusion that the defendants unlawfully prevented "wagons carrying equipment for said vessels from entering said piers." The testimony of the driver of the wagon shows that the request was not to deliver, and was clearly within the license granted by section 20, *supra.* I think it is clearly shown that the rights of the complainant as an interstate commerce and United States mail carrier were violated, that defendants exceeded the privileges granted by the Anti-Trust Act, *supra*, and the duty imposed upon plaintiff by the Commerce Act was jeopardized.

It is not the purpose of this court to undertake the policing of the city of Seattle with relation to the employes of complainant, but the issue here is limited to Piers 2 and A and approaches thereto. Nor is it the purpose of the court to abridge any of the rights given by section 20 of the Anti-Trust Act, *supra.* Defendant officers and members of defendant association will be enjoined from unlawfully causing, inducing, or in any way forwarding any of the acts complained of as limited herein, and in accordance with the view herein expressed.

A decree may be presented.

KNAUER ET AL. *v.* UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. September 16, 1916.)

[237 Fed. Rep., 8.]

Criminal Law 1186 (4)—Review—Technical Error—Indictment.— Under Rev. St. § 1025 (Comp. St. 1913, § 1691), which provides that no indictment shall be deemed insufficient by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant, an indictment is sufficient which con-

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tains a sufficient accusation of crime, and alleges facts which are sufficient in law to sustain a conviction, and which furnish the accused with such description of the charge against him as will enable him to make his defense, and avail himself of his conviction or acquittal for protection against future proceedings for the same offense.[*]

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3215; Dec. Dig. 1186 (4).]

CONSPIRACY 43 (6)—CONSPIRACY TO VIOLATE LAW OF UNITED STATES—INDICTMENT.—In an indictment for conspiracy to violate the laws of the United States, the conspiracy itself is the gist of the offense, and the law to be violated need not be set out with the particularity required if its direct violation were charged.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 86, 91; Dec. Dig. 43 (6).]

MONOPOLIES 31—ANTI-TRUST ACT—CONSPIRACY IN RESTRAINT OF TRADE—INDICTMENT.—An indictment for conspiracy in restraint of interstate trade or commerce, under Sherman Anti-Trust Act July 2, 1890, c. 647, § 1, 26 Stat. 209 (Comp. St. 1913, § 8820), need not aver that defendants were engaged in interstate commerce, nor the doing of an overt act, nor that the conspiracy was successful.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 20; Dec. Dig. 31.]

INDICTMENT AND INFORMATION 59—DESCRIPTION OF OFFENSE.—When the definition of an offense, whether it be by common law or by statute, includes generic terms, it is not sufficient that an indictment charge the offense in the same generic terms, but it must aver the particulars.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 180, 181; Dec. Dig. 59.]

INDICTMENT AND INFORMATION 125 (5½)—DUPLICITY—CONSPIRACY.—A charge in a single count of a conspiracy to violate two or more laws of the United States does not render the indictment duplicitous.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 381; Dec. Dig. 125 (5½); Conspiracy, Cent. Dig. § 81.]

CRIMINAL LAW 1149—INDICTMENT AND INFORMATION 163—MOTION FOR BILL OF PARTICULARS—DISCRETION OF COURT.—A motion by the defendant in a criminal case for a bill of particulars is addressed to the discretion of the court, and its action thereon is not reviewable.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3039-3043, 3058; Dec. Dig. 1149; Indictment and Information, Cent. Dig. § 525; Dec. Dig. 163.]

[9] MONOPOLIES 29—ANTI-TRUST ACT—"COMBINATION IN RESTRAINT OF TRADE."—The National Association of Master Plumbers was formed prior to 1890, and at once took measures to prevent manu-

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facturers and dealers in plumbers' supplies from selling direct to consumers, by resolving not to patronize such manufacturers and dealers as refused to agree to such restrictions, and by adopting a system of espionage. This policy was continued after 1890, and so extended as to bind the members to restrict their purchases to manufacturers and dealers who sold only to members of the association, excluding all other customers, although they might also be master plumbers. Members were listed in a book issued and distributed by the association. *Held* that, on the enactment of the Sherman Anti-Trust Act, the association became an illegal combination in restraint of interstate trade, and that any member who thereafter joined or affiliated with it, with knowledge of its illegal purposes and methods, was guilty of a criminal offense under section 1 of the act.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 19; Dec. Dig. 29.

For other definitions, see Words and Phrases, First and Second Series, Combination in Restraint of Trade.]

MONOPOLIES 31—ANTI-TRUST ACT—PROSECUTION FOR CONSPIRACY IN RESTRAINT OF TRADE—EVIDENCE.—On the trial of members of the association for criminal conspiracy in restraint of interstate trade, the official record of the proceedings of the association, showing the resolutions passed declaring its purposes, and the methods adopted for carrying them out, was admissible in evidence.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 20; Dec. Dig. 31.]

In Error to the District Court of the United States for the Southern District of Iowa; John C. Pollock, Judge.

Criminal prosecution by the United States against Robert Knauer and others. Judgment of conviction, and defendants bring error. Affirmed.

Louis C. Boyle, of Kansas City, Mo. (*Clark McKercher* and *George H. Calvert*, both of Washington, D. C., on the brief), for plaintiffs in error.

Claude R. Porter, U. S. Atty., of Centerville, Iowa (*G. Carroll Todd*, Asst. Atty. Gen., on the brief), for the United States.

Before HOOK and SMITH, Circuit Judges, and REED, District Judge.

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SMITH, Circuit Judge.

Thirty-six persons, members of the National Association of Master Plumbers, among them Robert Knauer, Hugh B. McCarten, John P. Cunningham, and George H. Wentz, were indicted by the District Court of the United States for the Southern District of Iowa, charged with a conspiracy in violation of section 1 of the Sherman Act which is as follows:

"Section 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprison[10]ment not exceeding one year, or by both said punishments, in the discretion of the court." 26 Stat. 209.

The defendants were all tried, found guilty, and Knauer, McCarten, Cunningham, and Wentz were sentenced, and sued out a writ of error in this court. It thus appears that the plaintiffs in error were defendants in the district court, and the defendant in error was the plaintiff there, and they will be so styled here. The record contains more than 2,300 pages, and there are more than 660 pages in the printed arguments. All this has been read and carefully considered, but it is manifest that the case must be treated in this opinion in a more condensed form.

The first and second assignments of error complain of the overruling of demurrers to the indictment and the similar overruling of the motion to quash it. The indictment covers 26 pages of the printed record, and we cannot, therefore, set it out in full here. It in substance charged that from the 4th day of June, 1911, to the finding of the indictment 240 manufacturers and wholesale dealers in plumbing supplies, who are named, and the particular places where they were engaged in business are given, were engaged in interstate commerce in such plumbing supplies; that the defendants were engaged during all of said period in a conspiracy in restraint of such interstate commerce in plumb-

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ing supplies, the place of business of each of the defendants is given, and that each of them was a member of the National Association of Master Plumbers; and when he held any office therein, or in the State Association of Master Plumbers subordinate to the National Association, or in local associations so subordinate, those facts are set forth. The indictment further alleges that:

"Each of said local associations has throughout said period been affiliated: (1) With other similar associations of master plumbers in all the principal towns and cities of the United States; (2) with a certain association in each State called the State Master Plumbers' Association for that State, composed of members whose qualifications for membership have consisted in their being members in good standing of the several local associations of said State, wherever such local associations existed, and in their being willing to be subordinate to said State associations; and (3) with still another association called the National Association of Master Plumbers of the United States, composed of all the members of all said local and State associations, and to which all said local and State associations have been subordinate. The prime object of all said local and State associations, and of said National Association of Master Plumbers of the United States, throughout said period of time, as said defendants have each well known, has been to secure to the members thereof all the business in the United States growing out of the furnishing and installing of plumbing supplies, and this to the absolute exclusion of all others engaging in or endeavoring to start or carry on such business, and thereby unlawfully to monopolize that business.

"To this end said members of said local and State associations and said National Association of Master Plumbers of the United States have, at all times during said period, concertedly conducted their business strictly upon a plan involving the purchasing of such plumbing supplies only from manufacturers and wholesale dealers who have refrained from selling or furnishing such plumbing supplies to master plumbers and retail dealers not members of such associations, and refusing to deal with manufacturers and wholesale dealers who have made or endeavored to make sales to master plumbers and retail dealers not members of said association; and as a part of, and for in-
[11] suring adherence to and the success of said plan of business, said members and associations have established and maintained a system of espionage over the business of said manufacturers and wholesale dealers and that of all persons and concerns not members of such associations; have systematically gathered and disseminated among themselves information touching acts of such manufacturers and wholesale dealers in the carrying on of their said business which were not in accord with said prime object of said associations, and

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particularly touching sales of such plumbing supplies to persons and concerns not members of any of said associations; in many instances have taken upon themselves to notify such manufacturers and wholesale dealers of their said 'unethical' acts in a way to imply a threat of refusal to deal with, that is to say, a boycott, and have often in fact boycotted, the manufacturers and dealers so offending; and have busied themselves in the procuring of the passage of local laws and ordinances pertaining to the licensing of plumbers and the installing of plumbing, and in the administering of such local laws and ordinances in such manner as wrongfully to favor such associations and their members as against persons not members of such associations; and those things have been done, notwithstanding the proportion of the business so carried on by said members of said associations has very greatly exceeded the proportion carried on by others, whereby said members of said associations have been in a position where, by such concerted action, they could, as they have well known, bring financial ruin to manufacturers and wholesale dealers failing to conduct their business in accord with said prime object of said associations—all to the great humiliation of said manufacturers, wholesale dealers, and others who were not members of said association, and the serious and inexcusable oppression of many worthy persons less prosperous than themselves who have been ambitious to engage in, but who have been by said conspiracy prevented from engaging in, the business of master plumbers in competition with said members of said association, as well as to the great detriment of the general public, and to the scandal and disgrace of their own profession.

"So far as the purchasing of said plumbing supplies from manufacturers thereof and wholesale dealers therein has been concerned, each of said defendants, throughout said period of time, has, in every way in his power, and in ruthless disregard of the rights of others, conducted his business upon the unlawful and oppressive plan aforesaid, well knowing the character and effect thereof, and intending to accomplish said prime object of said associations, and so have put an undue, unwarranted, and unreasonable restraint upon the interstate trade and commerce in this indictment above described, particularly in said Central Division of said Southern District of Iowa, and have prescribed and enforced a rule for governing, and one which has in fact governed, said trade and commerce, and unlawfully have engaged, as aforesaid, in a conspiracy in restraint of trade and commerce among the several States contrary to said act of Congress and against the peace and dignity of the United States."

The defendants, apparently without withdrawing the plea of not guilty theretofore entered, filed on October 29, 1914, a general demurrer to the indictment, and on November 23, 1914, filed a general and special demurrer, which we assume was a substitute for the original demurrer. It was elaborate,

but in substance was upon the grounds: First, that the indictment did not state facts sufficient to constitute a crime against the United States; second, that it is duplicitous; third, the specific purposes and acts charged as constituting a conspiracy are not charged against the defendants; fourth, that the indictment is insufficient, vague, uncertain, indefinite, and informal. The ways in which the indictment is deemed insufficient, vague, uncertain, indefinite, and informal are then set forth in detail, and would cover five pages of this opinion. The defendants also filed a motion to quash the indictment substantially upon the same alleged grounds. [12] These demurrers and the motion to quash were overruled by the court.

[1] It is provided by section 1025 of the Revised Statutes that:

"No indictment found and presented by a grand jury in any district or circuit or other court of the United States shall be deemed insufficient, nor shall the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant."

The question in its last analysis is: Does the indictment contain a sufficient accusation of crime, and do its averments furnish the accused with such a description of the charge against them, as will enable them to make their defense and avail themselves of their conviction or acquittal for protection against future proceedings for the same offense? And it has been held that the indictment must be sufficient to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to sustain a conviction if one should be had. *United States* v. *Cruikshank*, 92 U. S. 542, 558, 23 L. Ed. 588; *Dunbar* v. *United States*, 156 U. S. 185, 191, 15 Sup. Ct. 325, 39 L. Ed. 390; *Rosen* v. *United States*, 161 U. S. 29, 34, 16 Sup. Ct. 434, 480, 40 L. Ed. 606; *New York Central Railroad* v. *United States*, 212 U. S. 481, 497, 29 Sup. Ct. 304, 53 L. Ed. 613; *United States* v. *Bennett*, 16 Blatchf. 338, 24 Fed. Cas. 1093, 1097; *Hume* v. *United States*, 55 C. C. A. 407, 118 Fed. 689, 696.

[2] In all charges of conspiracy, the conspiracy itself is the gist of the offense, and where a conspiracy is charged

to violate the laws of the United States, if the conspiracy be specifically alleged, it is not necessary to allege the details of the law of the United States to be violated with the accuracy it would be if the charge were directly of the violation of the law of the United States, and not of the conspiracy to violate it. *Williamson* v. *United States*, 207 U. S. 425, 446, 28 Sup. Ct. 163, 52 L. Ed. 278.

[3] The act in question does not require that the defendants should have been engaged in interstate commerce. If they were all engaged exclusively in intrastate commerce, and they formed a conspiracy to restrain the trade of the manufacturers and wholesalers who were engaged in interstate commerce, that would make them guilty. *Loewe* v. *Lawlor*, 208 U. S. 274, 301, 28 Sup. Ct. 301, 52 L. Ed. 488, 13 Ann. Cas. 815; *Nash* v. *United States*, 229 U. S. 373, 379, 33 Sup. Ct. 780, 57 L. Ed. 1232; *Patterson* v. *United States*, 138 C. C. A. 123, 222 Fed. 599, 618. This is substantially what is charged here. It is not necessary to their guilt that the conspiracy should be successful. Under the ancient law of conspiracy, no overt act was at all necessary to make out the guilt of the defendant.

On March 2, 1867, Congress passed a law (section 30, c. 169, 14 Stat. 471, 484), which is substantially re-enacted in section 5440 of the Revised Statutes and section 37 of the Criminal Code (act March 4, 1909, c. 321, 35 Stat. 1096 [Comp. St. 1913 § 10201]). In its last revision this reads:

> "Sec. 37. If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner [13] or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than ten thousand dollars, or imprisoned not more than two years, or both."

The defendants are not charged under that section, but under section 1 of 26 Stat. 209. The act in question does not contain the clause that if "one or more of such parties do any act to effect the object of the conspiracy," nor any similar words. Under these circumstances an overt act by any of the defendants was unnecessary under this section of the Sherman Law. *Nash* v. *United States*, 229 U. S. 373, 378, 33 Sup. Ct. 780, 57 L. Ed. 1232; *Brown* v. *Elliott*,

225 U. S. 392, 32 Sup. Ct. 812, 56 L. Ed. 1136; *Hyde* v. *United States*, 225 U. S. 347, 32 Sup. Ct. 793, 56 L. Ed. 1114, Ann. Cas. 1914A, 614.

But the further consideration of that question is not essential here, as there are a number of acts done by one or more of the parties to effect the object of the alleged conspiracy.

[4] It is an elementary principle of criminal pleading that when the definition of an offense, whether it be by common law or by statute, includes generic terms, it is not sufficient that the indictment charge the offense in the same generic terms as in the definition, but it must state the species—it must descend to particulars. *United States* v. *Cruikshank*, 92 U. S. 542, 558, 23 L. Ed. 588; *United States* v. *Hess*, 124 U. S. 483, 8 Sup. Ct. 571, 31 L. Ed. 516.

[5] It is claimed that the indictment is duplicitous, in that it charges a conspiracy to violate more than one section of the Sherman Law in a single count. "The court will never be keen to hold an indictment bad for duplicity." 5 Ruling Case Law, 1081. Without intimating that we think such a thing possible under the Sherman Law as an indictment being duplicitous because it charges in one count a violation of two or more sections of the act, we are satisfied that a charge in a single count of a conspiracy to violate two or more laws of the United States is not duplicitous. *Joplin Mercantile Co.* v. *United States*, 131 C. C. A. 160, 213 Fed. 926, 929, Ann. Cas. 1916C, 470; *John Gund Brewing Co.* v. *United States*, 124 C. C. A. 268, 206 Fed. 386. Without more, we are of the opinion that the demurrers and motion to quash were all properly overruled.

[6] The indictment was returned June 4, 1914. On July 7, 1914, the defendants were all arraigned and pleaded not guilty. By agreement of parties the case was then set for trial on December 8, 1914. At that time the case was upon application of defendants continued until February 8, 1915. On February 9, 1915, the case not having been reached because the trial judge had not reached Des Moines, the defendants filed a motion for a bill of particulars. This was supported and resisted by affidavits. This motion was submitted upon the arrival of the judge on February 10th. It was over-

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ruled, "both as to its merits and for the further reason that the same was filed without leave, and after this case had been twice peremptorily set for trial, and the defendants had demurred to and pleaded not guilty to the indictment herein." This application was addressed to the discretion of the trial court, and its action thereon is not subject to review. *Dunlop* v. *United States*, 165 [14] U. S. 486, 491, 17 Sup. Ct. 375, 41 L. Ed. 799. See *Rinker* v. *United States*, 81 C. C. A. 379, 151 Fed. 755, 759; *Morris* v. *United States*, 88 C. C. A. 532, 161 Fed. 672, 681. Nothing need be added on this subject. The matter was discretionary with the trial court, and not only is no abuse of the discretion shown, but the long delay in filing the motion until the case was substantially reached a second time for trial fully justified the action of the trial court.

[7] The sixth assignment of error is to the overruling of a request for instructed verdict at the conclusion of all the evidence, and the seventh assignment is that there is no competent evidence to sustain the verdict. In *Eastern States Lumber Association* v. *United States*, 234 U. S. 600, 34 Sup. Ct. 951, 58 L. Ed. 1490, L. R. A. 1915A, 788, it appeared that there was a combination of retail lumber dealers to distribute to the members of the association names of wholesale lumber dealers who made prices to consumers. The court said:

"A retail dealer has the unquestioned right to stop dealing with a wholesaler for reasons sufficient to himself and may do so because he thinks such dealer is acting unfairly in trying to undermine his trade. 'But,' as was said by Mr. Justice Lurton, speaking for the court in *Grenada Lumber Co.* v. *Mississippi*, 217 U. S. 433, 440 [30 Sup. Ct. 535, 54 L. Ed. 826], 'when the plaintiffs in error combine and agree that no one of them will trade with any producer or wholesaler who shall sell to a consumer within the trade range of any them, quite another case is presented. An act harmless when done by one may become a public wrong when done by many acting in concert, for it then takes on the form of a conspiracy, and may be prohibited or punished, if the result be hurtful to the public or to the individual against whom the concerted action is directed.' When the retailer goes beyond his personal right and, conspiring and combining with others of like purpose, seeks to obstruct the free course of interstate trade and commerce and to unduly suppress competition by placing obnoxious wholesale dealers under the coercive influence of a condemnatory report circulated among others, actual or possible custom-

ers of the offenders, he exceeds his lawful rights, and such action brings him and those acting with him within the condemnation of the act of Congress, and the district court was right in so holding."

The defendants contend that the National Association of Master Plumbers was organized for legitimate purposes, and that if it deviated from such purposes and engaged in an illegal enterprise as charged there is no evidence that the defendants, and particularly Cunningham and Wentz, ever joined in the proceedings to convert this organization from its legitimate purposes to the illegal ones charged. Very considerable reliance in this regard is placed upon *Ryan* v. *United States*, 132 C. C. A. 257, 216 Fed. 13. This makes it important to ascertain from the evidence whether the National Association of Master Plumbers, immediately after the passage of the Sherman Law, was a legal organization which was diverted to an illegal purpose, or whether it was illegal from the passage of the act of 1890. The official proceedings of the National Association of Master Plumbers were introduced in evidence and it appears therefrom that:

"For some time prior to the close of 1882, the Master Plumbers' Association of New York had been deeply impressed with a conviction of the necessity of taking some concerted action looking towards protection against the injury resulting to the trade through the facilities to purchase, at and below trade price, afforded to the outside public by manufacturers and dealers in plumbing materials.

[15] "A full attendance of the association was held on December 1st, which subsequently resolved itself into a committee of the whole. The subject of 'protection to the trade' was made the order of the day (General Locke being called to the chair), and was carefully discussed; the result being that a committee of ten was appointed to devise such measures as would be best calculated to secure the needed protection.

"This committee, at a subsequent meeting, was discharged, owing to the want of such discretionary power as would enable it to act efficiently. A new committee of twenty-one, afterwards enlarged to twenty-five, was then created in its place, with Mr. T. J. Byrne as chairman, having a fuller scope of action for the performance of the duties entrusted to it. This committee met on the 10th of January [1883], at the Astor House, New York City, and organized by electing officers and appointing several sub-committees, and issued an invitation to the Association of Master Plumbers of Brooklyn to unite with them, which was heartily responded to. The committee immediately realized that to insure success it would be necessary to seek the co-operation of the trade throughout the country generally, and accord-

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ingly the following circular, issued by the joint protection committees of the New York and Brooklyn Associations, was prepared by the secretary and sent broadcast all over the United States:

["'Association of Master Plumbers of the City of New York. 11 West 24th Street. Geo. D. Scott, president. F. Reynolds, secretary.]

"'New York, *January 25, 1883.*

"'*To the master plumbers of the United States:*

"'Gentlemen: The necessity of adequate protection against influences having an injurious bearing on our business has at last aroused considerable attention and created widespread discussion among the trade; and, as a result, the Association of Master Plumbers of the city of New York, together with that of the city of Brooklyn, have decided to take prompt and vigorous measures with a view to the termination of so deplorable and unsatisfactory a condition of affairs.

"'The associations, therefore, of the two cities, through their respective presidents, have appointed two committees to work in concert—the New York one consisting of twenty-five and the Brooklyn one of eleven members—for the purpose of devising and considering the most efficient means for the better protection of our interests and also the immediate adoption of such plans as may best conduce to that end.

"'It would scarcely be flattering to their intelligence to remind master plumbers of the obvious abuses which have crept into their business, or the many disadvantages under which it labors from various causes. Yet the best method of grappling with and suppressing evils so manifold and deep-lying must be matter of serious and deep consideration to those directly concerned.

"'Realizing, then, that the time for action has arrived, we are instructed to communicate with you confidentially to enlist your approval and coöperation."

It appears that:

"The responses to this appeal were of so encouraging a character as to warrant the committee in taking active measures to ensure the formation of master plumbers associations in the principal cities and towns throughout the different States, with a view to paving the way for holding a national convention of the craft in the near future, and the ultimate formation of a national association, sufficiently strong in numbers and united in sentiment, to command proper consideration from manufacturers and dealers."

Subsequently it appears the following was issued:

[" Committee Rooms of the Association of Master Plumbers of the Cities of New York and Brooklyn.]

"February 26, 1883.

"*To the master plumbers of the United States;*

"Gentlemen: The address lately issued to the Master Plumbers of the United States by the committee on protection of the New York

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and Brooklyn [16] associations, for the purpose of eliciting an expression of the feelings of those interested in the questions to which it referred, has met with a response so cordial, so unanimous, and so far exceeding our most sanguine hopes, as to warrant them in laying before you a few practical suggestions as to the mode whereby our rights may be best protected. * * * And now on this all important question of protection of our trade interests, which is really the pivot of the position we are striving for as an organization, it was necessarily alluded to only in guarded terms in our late circular; nevertheless it evoked so universal and heartfelt approval that we are more than confirmed in the belief that this question can only be satisfactorily solved by a general convention of the trade."

Under these circulars the first meeting of the National Association of Master Plumbers took place. On taking the chair Mr. Mead addressed the assembled delegates.

"Mr. Wade. I desire, Mr. Chairman, to amend the address by striking out the word 'protection' and substitute the words 'trade interests.' * * * I simply wanted to say, Mr. Chairman, that we in Chicago have made up our minds to change the word 'protection' as it occurs there to the words 'trade interests,' thus giving a broader field to work upon. And we think that the change would be for the interests of all of us, of all plumbers throughout the United States. * * * I am probably as radical as any man in this convention in favor of protection. I have worked hard and faithfully for it. I have correspondence here with me to show that we have carried our point in Chicago. We have established a careful policy, and that policy we will always use. We have brought our men to their knees. Now, we don't desire that our enemies should know what we are going to do here in this convention, and if we use the word 'protection' they will know just what we are about; but if we should use the words 'trade interests' they won't know exactly what it means. I believe in fighting our enemies without gloves. Let us establish our policy, and then let them come to us, instead of our going to them."

The question was subsequently put on the amendment to strike out the word "protection" and insert the words "trade interests," and lost. Subsequently at the same meeting, on motion of Mr. Boyd, a committee of 10 was appointed to formulate a plan for protection between the dealers and master plumbers throughout the United States. At a later hour it was said:

"It must be thoroughly a national association spreading from the Atlantic to the Pacific and from the north to the south. Gentlemen, the question of protection directly falls to the ground and is done when you have a national association that is broad enough so that we

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can send forth an edict to any firm of materialmen in any city, in any State, and that edict goes forth that you shall protect in the different cities every one that sends an honest complaint, until you shall be able to say to any dealer: 'Until you protect the men in the plumbing business in your city by preserving the proper discount, we shall not buy one jot or tittle of your materials.'"

The next year, in 1884, the national association met at Baltimore, and they adopted the following resolutions:

"Whereas the manufacturing and wholesale firms in plumbing materials persist in selling to consumers to our injury and detriment, placing us toward our customers in the light of extortionists, causing endless trouble; and

"Whereas the system of protecting us from this wrong which draws in its wake other wrongs, is ineffective; it is absolutely necessary to perfect such a system, by united action, which will remove these evils from which we have suffered for years: Therefore be it

"*Resolved,* That we withdraw our patronage from any firm manufacturing or dealing in plumbers' material selling to others than master plumbers.

[17] "*Resolved,* That the manufacturers of gas fixtures selling to consumers shall not receive the patronage of any master plumber.

"*Resolved,* That the master plumbers shall demand of the manufacturers and wholesale dealers in plumbing materials to sell goods to none but master plumbers.

"*Resolved,* That this association shall keep a record of all journeymen and plumbers who place in buildings plumbing material bought by consumers of manufacturers or dealers.

"*Resolved,* That any manufacturing or wholesale dealers dealing in wrought iron pipe, who sell to consumers, shall not receive our patronage.

"*Resolved,* That a committee be appointed by this association in every State and county, for the purpose of reporting to the proper officer at its head in the State any violation of these resolutions.

"*Resolved,* That these measures are just and necessary to our welfare and a rigid enforcement is demanded.

"*Resolved,* That this convention indorse the above, and urge upon the national association to perfect and adopt a uniform system of protection for the trade over their entire jurisdiction."

In 1885 the association met at St. Louis. At this meeting President Young was authorized to use such measures as he deemed prudent in presenting the Baltimore resolutions properly before the manufacturers. The secretary reported that he had sent copies of the Baltimore resolutions to the manufacturers and jobbers throughout the country

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for their signatures, and that the responses were almost universally prompt and favorable, and the following resolution was adopted:

"Whereas the National Association of Master Plumbers, in convention assembled at Baltimore, June 25, 1884, in view of the numerous false relations which have sprung up between the manufacturers, plumbers, and consumers, whereby confusion and injustice have been produced, after much thought and discussion, passed a resolution whereby their relative rights and duties have been more clearly defined; and,

"Whereas the manufacturers, with but few exceptions, have adopted the resolutions as their rule of conduct: Now, therefore, in justice to ourselves and in honor toward the manufacturers, we recommend the following:

"*Resolved*, That it is the plain duty of this association to maintain and enforce the integrity of the Baltimore resolutions, and that all members of the craft, in self-defense, be requested to withdraw further patronage from dissenting manufacturers, and stand by those who stand by us."

At the same meeting it appears that:

"300 Baltimore resolutions sent to manufacturers and dealer in plumbers' material.

"1,000 arguments and Baltimore resolutions, as an address, sent out by the executive committee.

"300 pamphlets sent to the manufacturers and dealers asking for signatures for the Baltimore resolution."

The following recommendation was unanimously adopted:

"We find that the 'Baltimore resolutions' have been a benefit to the trade throughout the country during the past year, but, believing that our cause will be more advanced by allowing local associations certain discretions in the government of their own affairs, therefore we respectfully recommend that each local association shall make the necessary arrangements for the dealers and manufacturers of their own locality, and that the national association shall protect them where such agreement has been approved by the executive committee."

[18] At the fourth meeting, which was held at Deer Park in 1886, the Baltimore resolutions were interpreted as follows:

"*Resolved*, That any firm manufacturing plumbing materials selling to others than master plumbers, that we withdraw our patronage from such firm.

"*Resolved*, That the master plumbers shall demand of the manufacturers and wholesale dealers in plumbing materials to sell goods to none but master plumbers.

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"*Resolved*, That this association keep a record of all journeymen and plumbers who place in buildings plumbing material bought by consumers of manufacturers or dealers.

"*Resolved*, That any manufacturing or wholesale dealers dealing in wrought-iron pipe who sell to consumers shall not receive our patronage.

"*Resolved*, That it is not the intention of the foregoing resolutions to prevent the interchange of patented or any other plumbing materials between manufacturers and wholesale dealers in such goods, or their sale or exchange for the export trade.

"*Resolved*, That no local association shall make any other agreement with manufacturers or dealers than the above.

"*Resolved*, That a committee be appointed by this association in every State and county, for the purpose of reporting to the proper officer at its head in the State any violation of these rules.

"*Resolved*, That these measures are just and necessary to our welfare, and a rigid enforcement is demanded.

"*Resolved*, That this convention indorse the above, and urge the national association to perfect and adopt a uniform system of protection for the trade over their entire jurisdiction."

President James Allison said:

"The Baltimore resolutions are our own creatures, not our masters, and the plain, common-sense course to be pursued in regard to them is—instead of wrangling over our opinions—to review our experience calmly and dispassionately, weigh the good and evil carefully, and, while we remember that the standard of power in good government is the will of the majority, we must not forget that exact justice to one is not to be secured at the cost of injustice to another."

At this convention the executive committee reported:

"Your committee would also recommend that such localities where experience has proven that our members cannot at all times live up to the letter of the Baltimore resolutions without serious injury to themselves, that discretionary power be allowed to the local associations, provided no action of theirs shall conflict with the spirit of these resolutions, and also provided that the approval of the executive committee first be obtained thereto."

And:

"We would also recommend that the manufacturers and dealers in plumbers' supplies who have signed the Baltimore resolutions and carried out their spirit, and are in sympathy with the honest endeavors of the plumbing fraternity in raising the standard of their trade, deserve our coöperation and support, and we recommend them to the patronage of our fellow tradesmen."

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At the national association meeting held in Chicago in 1887 the following resolution was adopted:

> "*Resolved*, That the national association, through its executive heads, appoint a member of this organization in every city and town in the United States under its jurisdiction for the purpose of keeping a record of all dealers or manufacturers, or master plumbers, violating any of the protective resolutions of this association, said committee to report to the chairman on protection."

[19] In the language of the Supreme Court in *Grenada Lumber Co.* v. *Mississippi*, 217 U. S. 433, 441, 30 Sup. Ct. 535, 54 L. Ed. 826, "whether it would be an illegal restraint at common law is not now for our determination." But when the Sherman Law was passed in 1890 the National Association of Master Plumbers had been organized for the "protection" of master plumbers against the competition of the manufacturers and wholesalers, and had pledged members not to buy of such manufacturers and dealers as sold to consumers, and this had been declared "the pivot of the position we are striving for as an organization." On the day that the Sherman Law became effective this organization became illegal under the decision of *Eastern States Lumber Ass'n* v. *United States*, 234 U. S. 600, 34 Sup. Ct. 951, 58 L. Ed. 1490, L. R. A. 1915A, 788.

It is not our purpose to in any way limit the power of the members of the association to withdraw as soon as it became manifestly an illegal association. In other words, we would not deprive any member of his locus pœnitentiæ; but in 1899, after the passage of the Sherman Law, at New Orleans the National Association of Master Plumbers adopted what is known as the "New Orleans resolution," as follows:

> "That we, the master plumbers of the United States, in convention assembled, do hereby assert our rights to be protected in conducting our business as plumbers and business men, and in the future will purchase our supplies from those who sell only to members of the National Association of Master Plumbers and manufacturers and jobbers in accord therewith."

As there were about twice as many master plumbers outside the association as inside, though, generally speaking, the individuals outside had rather a smaller business than those inside, still the business of those outside was so con-

siderable that many of the manufacturers and dealers decided to resist the attempt, which was apparently successful in cutting from the list of their customers the consumers, and now sought to extend this to two-thirds of the plumbers. This resulted in a conference in New York, at which an agreement known as the "New York agreement" was made. This agreement was perhaps more nearly like the Baltimore plan than the New Orleans plan, and was agreed to by the National Association of Master Plumbers in 1900 at Baltimore. Conflicts arising under this agreement, in 1902 at Atlantic City, what was known as the "Cleveland resolution" was adopted, as follows:

"That members of the National Association of Master Plumbers are requested to confine their purchases of plumbing goods to manufacturers and jobbers who are willing to assist in improving the condition of the plumbing business, and who sell plumbing goods in localities where there are members of the National Association of Master Plumbers only to recognized master plumbers whose names appear in the National Directory of Master Plumbers, published under the supervision of the National Association of Master Plumbers."

It thus satisfactorily appears that the national association was called for the purpose of doing what is now a violation of law, and such purpose was "the pivot of" its position. Instead of withdraw[20]ing when it became illegal, members by remaining such, and continuing without objection when the association increased the already illegal restraint, became guilty under the Sherman Law without proof of any individual participation in any overt act. The institution, if the law had been as it now is, would have been illegal from its inception, and all who joined it with knowledge of its purposes, and remained members after the Sherman Law was passed, and made no effort to withdraw, or have the association withdraw, from its illegal course, are subject to conviction for conspiracy under the law. It seems needless to say that we do not mean that any person could be punished for joining this association prior to the passage of the Sherman Law, nor do we mean that a person could be punished who did not know of the illegal lines it was pursuing subsequent to the passage of that law,

nor could any one in any way be deprived of his locus pœnitentiæ; but one who was a member when the act of July 2, 1890, was passed, or who subsequently became a member, and who knew the illegal purpose of the association, and never withdrew from it or repudiated its illegal methods, is guilty under the act in question.

The case is not analogous to *Ryan* v. *United States*, 132 C. C. A. 257, 216 Fed. 13, because in that case a society was created for a wholly lawful purpose and diverted to an illegal one, while in this case the very pivot of the association was the illegal conspiracy as soon as the Sherman Law was passed. As it appears that all of the defendants were members of the National Association of Master Plumbers, there was sufficient evidence to permit a conviction of all of them, and the motion to direct a verdict was correctly overruled.

We might add that the National Plumbers' Association issued two books, one, known as the "Brown Book," which contained a list of manufacturers and wholesalers "in accord" with the asociation, and the other, known as the "Red Book," which contained originally a list of members of the National Plumbers' Association and all other known master plumbers. Subsequently, having upon the advice of the Department of Justice suspended the publication of the Brown Book, the Red Book was changed so as to contain the names of members of the National Plumbers' Association and no others. It is manifest that the Brown Book was to furnish the members of the National Master Plumbers' Association the names of those who would yield to the association on the question of sales to customers, and later on sales to others than members, and was as long as it existed the strongest evidence of the conspiracy charged; but, no sooner was the Brown Book abolished, than the association approached the subject from the other side, and, being no longer able to notify members who were "in accord," they by the restriction of the Red Book to the members of the association notified those "in accord" who they could sell to. The Red Book identified the parties referred to in the Cleveland resolutions as those "whose names appear in the National Directory of

Master Plumbers published under the supervision of the National Association of Master Plumbers."

The motion to direct a verdict was correctly overruled, and the [21] seventh assignment of error must be treated in the same manner by this court.

[8] Assignments 8 to 14 are to the admission of the testimony quoted by this court and similar evidence. No objection was made to this evidence on the day it was offered. The importance we have assigned to this class of evidence in consideration of the sixth and seventh assignments shows its admissibility in the view of this court. There are nearly 20 other assignments of errors based on rulings on admitting evidence. Suffice it to say that most of the evidence was clearly admissible. In cases where the evidence is not manifestly admissible, it appears to be without legal prejudice, and finally the court by its charge, to which no exceptions were taken, took from the jury most of this evidence.

Without expressing any opinion as to its applicability, we may add that Revised Statutes, § 1011 (Comp. St. 1913, § 1672), contains the following:

> "There shall be no reversal in the Supreme Court or in a Circuit Court upon a writ of error * * * for any error in fact."

Without more, after the most careful study of all the record, we can find no error, and the judgment of the District Court as to all the defendants who sued out the writ of error is affirmed.

HOOK, Circuit Judge.

I concur in the affirmance, because of the practical construction and use by the association of its paper constitution and resolutions. This was not sporadic or exceptional, but was so general and persistent as to disclose an unlawful purpose of the organization, of which the complaining defendants must have been cognizant.

Syllabus.

UNITED STATES *v.* BOPP ET AL. (two cases.)[a]

(District Court, N. D. California, First Division. November 11, 1916.)

[237 Fed. Rep., 283.]

CONSPIRACY 27—OVERT ACT—NECESSITY.—A violation of the Sherman Act (act July 2, 1890, c. 647, 26 Stat. 209) is complete, where a conspiracy to do acts in restraint of trade is entered into, though no overt act is committed.[b]

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 38, 39; Dec. Dig. 27.]

CONSPIRACY 27—OVERT ACTS—NECESSITY.—The offense denounced by Criminal Code (act March 4, 1909, c. 321) § 37, 35 Stat. 1096 (Comp. St. 1913, § 10201), declaring that if two or more persons conspire to commit any offense against the United States or to defraud the United States, and one or more such parties do any act to effect the object of the conspiracy, each shall be punished, is not completed until an overt act is committed.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 38, 39; Dec. Dig. 27.]

CRIMINAL LAW 620(2)—TRIAL—CONSOLIDATION OF INDICTMENTS.—Defendants were charged with a conspiracy to do acts in restraint of trade, in violation of the Sherman Act, and also with a conspiracy, under Criminal Code, § 37, to violate section 13 (Comp. St. 1913, § 10177, declaring that whoever, within the territory or jurisdiction of the United States, begins or sets on foot, or provides or prepares means for, any military expedition or enterprise, to be carried on from thence against the territory or dominions of any foreign prince or State or people with whom the United States are at peace, shall be punished. The indictment under the Sherman Act charged no overt act, but charged that the conspiracy was entered into within the district, while the indictment under section 37 charged the commission of an overt act within the district, although the contemplated activities would take a wide range. Both conspiracies were directed against the munitions trade of the United States with France, Russia, England, and Japan, and defendants' purpose was to prevent the shipment or transportation of munitions of war to such countries, either by destroying munition plants in the United States or destroying ships and railroads outside of the United States engaged in carrying munitions. *Held*

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[a] The defendants were convicted and sentenced to fine and imprisonment. The case is pending on error in the Circuit Court of Appeals, Ninth Circuit.

[b] Syllabus copyrighted, 1917, by West Publishing Company.

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that, as there was an identity of parties and of subject matter, and both conspiracies were entered into in the same district, though defendants were indicted under the Sherman Act for their conspiracy against munition plants in the United States, the indictments should be consolidated and tried together for convenience.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1376; Dec. Dig. 620(2).]

Franz Bopp and others were charged with conspiracy to do acts in restraint of trade, in violation of the Sherman Act, and with conspiracy under Criminal Code, § 37, to violate section 13, and the Government moves to consolidate the two indictments. Motion granted.

See, also (D. C.) 230 Fed. 723; (D. C.) 232 Fed. 177.

John W. Preston, U. S. Atty., and *Annette Abbott Adams*, Asst. U. S. Atty., both of San Francisco, Cal.

J. P. O'Brien, of San Francisco, Cal., and *Samuel Platt*, of Carson City, Nev., for defendants Cornell and Crowley.

[284] *George A. McGowan*, of San Francisco, Cal., for defendant Von Brincken.

Sullivan & Sullivan and *Theo. J. Roche*, of San Francisco, Cal., for defendants Bopp and Von Schack.

DOOLING, District Judge.

Each of two indictments pending in this court charges the defendants Bopp, Von Schack, Von Brincken, Van Koolbergen, Cornell, Crowley, and Smith with a conspiracy. The first, No. 5870, charges a conspiracy to do certain acts in restraint of trade, in violation of section 1 of act July 2, 1890, c. 647, 26 Stat. 209 (Comp. St. 1913, § 8820), commonly known as the Sherman Act. The second, No. 5885, charges a conspiracy under section 37 of the Criminal Code to violate section 13 of the same code; that is to say, a conspiracy to begin and set on foot, and provide and prepare the means for, certain military enterprises to be carried on from within the territory and jurisdiction of the United States against the territory and dominions of the king of Great Britain,

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a foreign prince with whom the United States was at peace. To each indictment the defendants Bopp, Von Schack, Von Brincken, Cornell, and Crowley have interposed a plea of not guilty, and the causes, being at issue, have both been set for trial for December 4th of this year.

[1-3] The Government has moved that the court order that the two indictments be consolidated and tried together, under section 1024 of the Revised Statutes (Comp. St. 1913, § 1690), which is as follows:

"When there are several charges against any person for the same act or transaction, or for two or more acts or transactions connected together, or for two or more acts or transactions of the same class of crimes or offenses, which may be properly joined, instead of having several indictments, the whole may be joined in one indictment in separate counts; and if two or more indictments are found in such cases, the court may order them to be consolidated."

This motion is resisted by the defendants.

The Government claims that these indictments may be consolidated, because they come within all three of the provisions of section 1024; that is to say, that they are charges which may be properly joined, and (1) that they are against the same persons for the same acts or transactions; (2) that they are against the same persons for acts or transactions connected together; (3) that they are against the same persons for acts or transactions of the same class of crimes or offenses.

Affidavits have been presented in support of the motion and also in opposition thereto. However, the question as to whether the indictments do fall within any or all of the provisions above set forth may be determined here from an inspection of the documents themselves, unaided by any extraneous evidence. Turning to the indictments, it appears therefrom that each charges a conspiracy on the part of all the defendants and none others; that both conspiracies were entered into at the same time and place, and that each was directed against the commerce then carried on between the United States and foreign nations, particularly between the United States and France, Russia, England, and Japan, which nations were at war with Germany [285] and

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Austro-Hungary; that the ultimate purpose of each was to prevent the shipment or transportation of munitions of war to the countries last named; that the methods by which such shipment or transportation was to be prevented, as set forth in each indictment, were the same, and this was to be accomplished by blowing up, by means of bombs, dynamite, and other explosives, the plants in this country that were engaged in the manufacture of such munitions of war, and various ships and railroads here and in Canada that were engaged in transporting them.

In so far as these activities were to be directed against the manufacturing plants in this country, and railroads and ships generally engaged in the transportation of such munitions of war as were manufactured therein, it is claimed that a conspiracy existed in violation of the Sherman Act; and it is so charged in indictment No. 5870. In so far as the activities were to be directed against railroads in Canada, and certain designated ships belonging to some one or other of the nations mentioned, for the purpose of preventing the transportation of men, horses, and munitions of war to such nations, it is claimed a conspiracy existed to set on foot a military enterprise; and this is the charge contained in indictment No. 5885. This brief statement of the matters embraced in the two indictments seems to me sufficiently to show that the charges contained in them are charges for acts and transactions connected together within the meaning of section 1024, and I am also satisfied that they are such charges as may be properly joined.

In the indictment (5870) charging a violation of the Sherman Act no overt act is averred, as under that statute the offense is complete when the conspiracy is entered into. In the other indictment (5885) certain overt acts are alleged, as the offense of conspiracy under section 37 of the Criminal Code is not complete until such overt act is done by one of the conspirators to effect the object thereof. The defendants are not charged with actually having set on foot a military enterprise, but with having conspired to do so, and while the indictment alleges a conspiracy directed against railroads in Canada, and vessels belonging to the various nations, Great

Britain, Russia, France, and Japan, the location of which is not given, yet this conspiracy is averred to have been entered into at San Francisco, in this district, and every overt act charged, save one, is alleged to have been committed here, so that, while the contemplated activities as charged would, if carried out, have taken a wide range, the real things against which the defendants are called upon to make defense are alleged to have occurred here. In the alleged violation of the Sherman Act, the conspiracy is averred to have been entered into here. The cases, therefore, would present no more difficulty than is frequently encountered where there are several counts in a single indictment.

The Government claims that there will be a great number of witnesses in attendance, whose testimony will bear directly upon the matters charged in each indictment; that the proofs offered in support of one will to a great extent support the other; and that it would be to the real interest of both the Government and the defendants that both charges be heard together. Defendants contend that they will be [286] greatly prejudiced as to each if both indictments are tried together, for the reason that such testimony as is admissible in support of but one of the indictments would necessarily affect the minds of the jury adversely upon the other. This is not necessarily true, and may not be true at all. But to the extent that it may be true in the present instance it would seem to be true in every instance where different charges are tried together, whether embraced in a single indictment, or in two or more indictments consolidated for trial. I can conceive of no possible injury that defendants will suffer by the submission of both indictments to the same jury, and see no reason why this should not be done, and many reasons why it should. The motion will therefore be granted and the indictments consolidated for trial; and it is so ordered.

I am authorized to say that Judge Hunt, with whom I have conferred, agrees with this conclusion.

Syllabus.

THOMSEN ET AL., COMPOSING THE FIRM OF THOMSEN & COMPANY, v. CAYSER ET AL., COMPOSING THE FIRM OF CAYSER, IRVINE & COMPANY, ET AL.[a]

ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 2. Argued April 28, 29, 1914; restored to docket for reargument June 21, 1915; reargued January 19, 22, 1917.—Decided March 6, 1917.

[243 U. S., 66.]

For review in this court of a final judgment of the Circuit Court of Appeals directing that an action be dismissed, the writ of error should go to that court; and its efficacy is not impaired by the circumstances that, before allowance of the writ by that court, the trial court, obeying the mandate, has entered judgment of dismissal and has adjourned for the term before any application has been made to recall its action.[b]

When parties in the Circuit Court of Appeals, desiring to shorten the litigation by bringing the merits directly to this court, consent that a final judgment may be made against them in lieu of one remanding the cause for a re-trial, the consent is not a waiver of errors relied on, and a final judgment entered as requested is reviewable here.

Foreign owners of steamship lines, common carriers between New York and ports in South Africa, formed a combination, or "conference," to end competition among themselves and suppress it from without. They adopted uniform net tariff rates, and, for the purpose of constraining shippers to use their ships and avoid others, exacted deposits ("primage") of ten per cent of and in addition to the net freight charges, to be repaid as rebates or "commissions" in each case upon the lapse of a period of many months, but then [67] only if the shipper, up to the date set for repayment, had used the vessels of the coalition to the exclusion of all competitors. In respect of particular consignments the shipper's right to the refund was made similarly dependent on the "loyalty" of his consignee to vessels of the combination. The hold thus gained on shippers, through the accumulation of their deposits, enabled the coalition to maintain its tariff and custom, in general, while cutting rates with competitors in particular cases by means of "fighting ships." Several important rivals were gathered into the combination from

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[a] For prior opinions (149 Fed. Rep., 933), see vol. 3, p. 108; (166 Fed. Rep., 251), see vol. 3, p. 548; (190 Fed. Rep., 536), see vol. 4, p. 382.

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time to time, and a virtual monopoly was effected. *Held*, that the combination violated the Sherman Act.

Common carriers are under a duty to compete, and are subject in a peculiar degree to the policy of the Sherman Act.

A combination is not excusable upon the ground that it was induced by good motives and produced good results.

The conduct of property embarked in the public service is subject to the policies of the law.

The fact that the participants might have withheld the commercial service they rendered, i. e., stayed out of the business, can not justify an unlawful combination.

A combination affecting the foreign commerce of this country and put in operation here, is within the act although formed abroad; and

Those who actively participate in managing the affairs of the combination in this country are liable under § 7 although they are not the principals.

When more than a reasonable rate is exacted as a result of an unlawful combination, the excess over what was reasonable affords a basis for the damages recoverable under § 7, and whether, and to what extent, such rate, was unreasonable are questions determinable by the jury, on proper evidence and instructions.

When claims for damages for loss of custom are definitely stated, a charge advising the jury that the burden of proof is on the plaintiff, that they must not allow speculative damages, and that they are not required to guess at amounts but should be able to calculate them from the evidence, sufficiently guards against the danger of supposititious profits being considered as an element of the verdict.

Semble, that a general verdict for an amount which equals a particular claim of damages and interest may be assumed to have been responsive to that claim alone, although there were others which were submitted to the jury.

Failure to give an instruction upon the burden of proving rates un-[68] reasonable, *held*, at most a harmless error, in view of a painstaking trial and careful instructions upon the estimation of damages.

The trial court in its sound discretion may allow a new cause of action to be set up by amendment of the complaint.

190 Fed. Rep. 536, reversed.

Action, brought in the Circuit Court of the United States for the Southern District of New York, by plaintiffs in error against defendants in error and others under the Sherman Act to recover damages for injuries sustained as the result of a combination in restraint of foreign trade.

The defendants, it is charged, being common carriers between New York and South African ports, did, under cer-

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tain company names, sometime prior to December, 1898, enter into a combination and conspiracy in restraint of trade and commerce between New York and ports in South Africa to be rendered effective by making certain discriminations in rates of freight to be charged which were calculated to coerce and prevent plaintiffs and other shippers and merchants similarly situated from employing such agencies and facilities of transportation as might be afforded them by other common carriers.

For such purpose they united under the name of "The South African Steam Lines" and distributed a circular[1]

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[1] "THE SOUTH AFRICAN STEAM LINES.

"Notice to Shippers in the United States.

"Commission in Respect of Shipments by Steam and Sailing Vessels.

"LONDON, *31st December, 1898.*

"1. Shippers to all Ports of the Cape Colony and of Natal, and to Delagoa Bay, are hereby informed that until further notice, and subject to the conditions and terms set out herein each of the under-named Lines will pay Shippers by their Line a commission of ten per cent., calculated upon the net amount of freight at tariff rates received by such Line from such Shippers on their shipments from the United States to South Africa.

"2. The said Commission to be computed every six months up to the 31st January and 31st July in each year, and to be payable nine months after such respective dates to those shippers only who, until the date at which the Commission shall become payable shall have shipped exclusively by vessels despatched by the undernamed Lines respectively from the United States to Ports of the Cape Colony, Natal, and Delagoa Bay, provided that such shippers, either as Principals or as Agents, have not directly or indirectly made or been interested in any shipments to any of the aforesaid Ports by vessels other than those despatched by the under-named, and also provided that the Statement of Claim for such commission shall be made in the annexed form, within twelve months of the date of shipment, to the Line which shall have carried the goods in respect of which the Commission is claimed.

"3. The above commission is not payable on the goods of any Consignee who directly or indirectly imports goods by vessels other than those despatched by the under-named Lines.

"(Subscribed) AMERICAN & AFRICAN STEAMSHIP LINE.
UNION-CLAN LINE.

"All previous notices to Shippers or Consignees with reference to returns on Freight are cancelled.

"Note.—The above Commission will be payable to the Shippers

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[69] (Exhibit A) promising to pay shippers by their lines 10% upon the net amount of freight at tariff rates received on shipments from the United States to Africa, the commission to be computed every six months up to the thirty-first of January and the thirty-first of July in each year and to be payable nine months after such respective dates, but only to shippers who shipped exclusively by their lines to certain African ports, and provided that the shippers directly or indirectly have not made or have not been interested in any shipments by other vessels.

The commission is not payable on the goods of any consignee who directly or indirectly imports goods by vessels other than those dispatched by the combining lines.

These terms, it is charged, are against public policy and in restraint of trade.

About the middle of the year 1901 the defendant Deutsche Dampschiffahrts Gesellschaft, Hansa, and the firm of Funch, Edye & Co., as its agent, offered to trans[70]port merchandise to South African ports at reasonable rates and lower than those imposed by the other defendants. Thereupon the other defendants, for the purpose of avoiding the competition of those carriers, accepted them into the scheme and combination and there was agreement between them to continue the monopoly, and another circular was issued like the first, including only the additional announcement that the Deutsche Dampschiffahrts Gesellschaft, Hansa, had been added as one of the parties to the first-named agreement. The circular is attached to the complaint as Exhibit B.

Subsequently the defendants adopted a verbal agreement that altered the circulars to the effect that the so-called "loyal" consignees could collect the so-called rebates regardless of whether the shippers were also loyal; but on the condition that where the shippers and consignees were both loyal the rebates would be paid to the shippers, while if the consignee alone were loyal the rebate would be paid by the defendants in London direct to the so-called loyal consignee.

Defendants have not dispatched steamers to African ports at stated and regular dates but have placed steamers on

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berth to receive general cargo only at such times and for such ports in South Africa as they deemed best for their private gain and profit.

By reason of the monopoly so created by defendants, shippers—among whom are plaintiffs—have been compelled to submit to hardships and inconvenience, and to pay unreasonable and higher rates to such extent as to leave at the present time in the possession of defendants collectively, as plaintiffs are informed, about one and one-half million dollars representing the extortion of their rates, and that of such amount £1,112, 7s. 11d. has been extorted from plaintiffs.

Two steamship companies, the Prince Line and the Houston Line, have since the spring of 1902 offered to [71] carry from the United States to South African ports merchandise for a reasonable and remunerative rate lower than that exacted by defendants.

Defendants, to prevent such steamers from competing, have, in addition to the terms imposed on the South African trade by the circulars above mentioned, imposed further conditions which, while they ostensibly reduced the lower rate of freight and announced that defendants would pay the greater difference arising therefrom, by them called a special commission, they still exacted the payment of the higher rates, by them called tariff rates, at the time of shipment and imposed the following further conditions: (1) Precedent to the payment of such difference they require all shippers to be loyal to them. (2) Each shipper to disclose the name of his consignee. (3) The difference in rates to be computed only on those steamers which would come into direct competition with the steamers of either the Prince Line or the Houston Line, called by defendants "fighting steamers." (4) The special commission or rebate to be granted only on limited amounts of freight room, to be allotted at the will and discretion of defendants, additional freight room to be paid for at the higher rate under the conditions expressed in the circulars.

These additional conditions are intended to further restrain trade and in fact have prevented shippers who had already

shipped goods under the original conditions imposed by the circulars from further exporting as much merchandise to South African ports at reasonable rates offered other shippers.

To further secure the monopoly of the carrying trade to such ports and oust competition defendants have threatened to withhold and have withheld by way of forfeit the repayment of the so-called rebates from all those, among whom are plaintiffs, so-called by them "loyal shippers" and "loyal consignees," as aforesaid, [72] "who would not continue to remain loyal under the additional conditions superimposed as aforesaid."

For illustration plaintiffs adduce two instances when they were obliged to pay higher rates on a portion of the shipments, which rates were higher than those offered by the opposition lines, and defendants threatened, if plaintiffs made the shipments over the latter lines upon the more favorable terms, to withhold from repaying plaintiffs all sums previously so compulsorily paid by plaintiffs.

Plaintiffs are informed and believe that since the opposition lines have offered to carry freight to South African ports defendants have, by reason of their conspiracy, refused to allot uniform and proportionate freight room on their steamers and have arbitrarily discriminated between several shippers and even against the so-called "loyal" shippers and consignees, with the unlawful intent that the moneys so held by them would be sufficient security to prevent such shippers or consignees from making shipments of or importing their goods by the competing vessels.

By reason of the conspiracy plaintiff and others similarly situated have been compelled either not to ship at all and to lose a great deal of their trade or to ship on defendants' steamers a small portion of merchandise at the lower rates and the remainder, of the same class and even of the identical lot of merchandise, at the higher rates, which is practically prohibitive of any trade whatever by reason of the fact that the substantial difference between the two rates would be a discrimination against the various consignees and customers of plaintiffs and the various shippers and customers of other shippers by the same steamer.

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The conspiracy violates the laws of the United States and especially the Act of July 2, 1890, entitled "An Act to Protect Trade and Commerce against unlawful Restraints and Monopolies."

[73] Plaintiffs allege damages in the sum of £1,112, 7s. 11d., equal to $5,560, for which they pray as the excess over a reasonable rate, and the further sum of $10,000 damages, and the trebling of these sums.

The defendants, by their company names, filed separate answers in which they deny some of the allegations of the complaint and admit others. They deny conspiracy and combination for the purpose or with the effect set out in the complaint. They admit the making and issuing of the circulars designated A and B in the complaint, but deny that they have the effect or were intended to have the effect ascribed to them.

They admit the refusal to pay plaintiffs certain claims as rebates, but deny the distinction between loyal shippers and loyal consignees and all of the inferences and assertions in regard thereto.

As a separate defense they allege that all freight carried by them for plaintiffs was carried on bills of lading, each of which contained on its face the statement of the amount of freight to be paid and in respect to which in every instance plaintiffs either paid the freight or agreed to pay the amount of freight stated in the bill of lading and in each instance gave a due bill which was subsequently paid; that the payments were made freely and voluntarily and without protest; and that so far as any of the payments were made pursuant or with reference to the printed circulars plaintiffs coöperated knowingly in such transactions and cannot now be entitled to any relief on account of payments of freight made thereunder.

It was prayed that the complaint be dismissed.

Upon the issues thus formed there were two trials. At the conclusion of the testimony on the first trial the court considered that no cause of action was established under the Sherman Law and upon motion of defendants dismissed the complaint. 149 Fed. Rep. 933.

[74] The judgment was reversed by the Circuit Court of Appeals (October, 1908). 166. Fed. Rep. 251.

Upon the return of the case to the Circuit Court it was tried to a jury, resulting in a verdict for plaintiffs against the defendants composing the firms of Cayser, Irvine & Company; Barber & Company; and Norton & Son, the action as to the other defendants having abated or been dismissed by the court.

The judgment recites that the action was brought under the Act of Congress of July 2, 1890, and that a verdict had been rendered against the defendants above named for the sum of $5,600, with interest in the sum of $1,973.06, in all $7,573.06; that thereupon the court directed the clerk to treble the amount of the verdict pursuant to the terms of the act of Congress, making the amount $22,719.18, and that, the parties consenting, the court fixed $2,500 as an attorney's fee. The judgment was reversed by the Circuit Court of Appeals, one member dissenting (July, 1911). 190 Fed. Rep. 536.

The Circuit Court at the first trial (Judge Hough sitting) was of opinion that the testimony did not establish that the combination charged against defendants was in unreasonable restraint of trade. The Circuit Court of Appeals expressed a different opinion. The court said that the substance of the complaint was that defendants were engaged as carriers in South African trade and had entered into a combination in restraint of foreign trade and commerce in violation of the act of Congress by means of a scheme under which they united as "The South African Lines," fixed rates, and shut off outside competition by requiring shippers to pay a percentage in addition to a reasonable freight rate, which they should receive back in case—and only in case—they refrained from shipping by other lines. And the court said the evidence showed the existence of a "conference" for the purpose of fixing and maintaining rates and a return "commission" to "loyal" [75] shippers. The manifest purpose of the combination and its effect were, it was further said, to restrain competition and that it was therefore in contravention of the Federal Anti-Trust Act.

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The court considered that whether the restraint was reasonable or unreasonable was immaterial under the decisions of this court, or whether the combination was entered into before or after plaintiffs commenced business, the statute applying to continuing combinations, or whether the combination was formed in a foreign country, as it affected the foreign commerce of this country and was put into operation here. And as the plaintiffs had alleged damage, the court decided that they were entitled to an opportunity to prove it and remanded the case to the Circuit Court.

Upon the second appeal the court declared a change of view, saying: "When this case was in this court before we said, upon the authority of the decisions of the Supreme Court as we then interpreted them, that whether the restraint of trade imposed by the combination in question was reasonable or unreasonable was immaterial," and that it was "also apparent from the record that the Circuit Court upon the second trial in holding as a matter of law that the combination shown was in violation of the statute, acted upon the same view of the law." And further: "In the light of the recent decisions of the Supreme Court in the Standard Oil and Tobacco Cases, the construction so placed upon the statute by this court and the Circuit Court must be regarded as erroneous and a new trial must be granted unless the contentions of the parties are correct that, upon the facts shown, this court can now determine the legality of the combination."

The court then said that it was impossible to hold that the record disclosed a combination in unreasonable restraint of trade, but that it would be unduly prejudicial to plaintiffs to reverse the judgment with instructions to [76] dismiss; that as the plaintiffs had presented their case in view of the decision of the court that the reasonableness of the restraint was immaterial, it would be unjust to them to dismiss the complaint because their proof did not conform to another standard, and that upon another trial the plaintiffs might be able to "produce additional testimony tending to make out a case within the Supreme Court decisions referred to." Accordingly, the court remanded the case for a new trial.

Subsequently a rehearing was granted on petition of plaintiffs, who waived any right to a new trial and consented that the case should be disposed of one way or the other. As a result of the rehearing the mandate was recalled and the judgment reversed with instructions to enter an order dismissing the complaint.

This writ of error was then allowed.

Mr. A. Leo Everett and *Mr. Lorenzo Ullo* for plaintiffs in error:

Shippers are peculiarly at a disadvantage and carriers are forbidden to subject them to unreasonable conditions. *Lockwood* v. *New York Central R. R. Co.*, 17 Wall. 357; *Menacho* v. *Ward*, 27 Fed. Rep. 259. The maxim *volenti non fit injuria* therefore does not apply. The ten per cent. payments were made under duress. *Swift Company* v. *United States*, 111 U. S. 22. The parties were not *in pari delicto. Duval* v. *Wellman*, 124 N. Y. 156; *Interstate Commerce Commission* v. *Texas & Pacific R. R.*, 52 Fed. Rep. 187; *Loder* v. *Jayne*, 142 Fed. Rep. 1015. Tender of goods and protest by plaintiffs, and refusal to carry by defendants were unnecessary.

Unreasonable or coercive rates of freight are recoverable. *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426; *Herserman* v. *Burlington, Cedar Rapids & Northern Ry. Co.*, 63 Iowa, 732; *Parker* v. *Great Western R. R. Co.*, 7 M. & G. 253.

[77] All parties to the unlawful combination are liable *in solido. Atlanta* v. *Chattanooga Foundry*, 127 Fed Rep. 23; *Interstate Commerce Commission* v. *Texas & Pacific R. R., Supra; Loder* v. *Jayne, supra.*

Agents of principals are equally responsible *in solido* with all parties to the illegal combination. See *Leonard* v. *Pool*, 114 N. Y. 371.

The jury found that the ten per cent. exaction was an unreasonable and coercive rate. There is no doubt that the verdict was for the amount so exacted and paid, and not for other items of damage which plaintiffs had claimed. This establishes in itself that the effect of the combination

Argument for Plaintiffs in Error.

was unreasonable. Non-competitive rates are presumably unreasonable, especially where the lack of competition is the achievement of the party fixing the rate. *China and Japan Trading Co.* v. *Georgia R. R.*, 12 I. C. C. 241; Taft, J., as quoted with approval in *Addyston Pipe & Steel Co.* v. *United States*, 175 U. S. 211, 237; *Menacho* v. *Ward*, *supra*.

That the Anti-Trust Act was violated is plain under *Standard Oil Co.* v. *United States*, 221 U. S. 1; *United States* v. *American Tobacco Co.*, 221 U. S. 106; and *Nash* v. *United States*, 229 U. S. 373. The court's reasoning in the first of these cases is directed to the question whether the acts complained of, and claimed to have benefited the trade, were reasonably to be held in restraint of trade; whether they were within the condemnation of the statute, reasonably construed, considering the contracts or agreements, their necessary effect, and the character of the parties by whom they were made. But a "reasonable construction" of the statute is far different from an examination into the reasonableness of the restraint. The examination into the reasonableness of the cause of the restraint is what calls for a reasonable construction of the statute. When by a reasonable construction of the statute, the acts complained of are found to cause actually [78] or potentially a restraint of trade within the meaning of the prohibition, a further inquiry as to the reasonableness of its effect is immaterial.

This combination is not an "aggregation of capital" necessary for the development of trade; nor is it a unification of interests to cheapen freight rates or general expenses, but it is avowedly a combination to suppress competition among the constituents and keep away outside competition, by coercive means. It is prejudicial to the public interest of the United States. *Nash* v. *United States*, *supra; United States* v. *Pacific & Arctic Ry. & Nav. Co.*, 228 U. S. 87.

The doctrine of *Mogul Steamship Line* v. *McGregor*, 31 L. R. 554 (1888); 23 L. R. 598 (1889); 17 App. Cases, 25 (1891), was not approved by this court in the *Standard Oil Case;* it was based on the British legislative policy

of the time, and differs from the earlier common law as inherited in this country and federalized by the Sherman Act. *Hooker* v. *Van DeWater*, 4 Denio, 349; *Stanton* v. *Allen*, 5 Denio, 434; *Atchison* v. *Mallon*, 43 N. Y. 147; *Elmira Coal Co. Case*, 68 N. Y. 558; *People* v. *Sheldon*, 139 N. Y. 251; *Lough* v. *Outeridge*, 143 N. Y. 271. The *Mogul Case* also involved a different scheme and a different cause of action.

Under the Sherman Act, contracts and combinations which before the Act were merely unenforceable as between the parties, became actionable and criminal. This necessarily resulted, because the definition of combinations was expressed in terms which embraced those which were unlawful but not actionable, such as the *Mogul* combination. The British authorities seem to agree that such a state of facts would, in the United States, be interpreted as coming within the prohibition of the Sherman Act. See the reports of the Members of the Royal Commission on Shipping Conferences in the Journal of the Society of Comparative Legislation, New Series, [79] vol. X (1909), p. 144, and *Attorney General* v. *Adelaide Steamship Co.*, A. C. (1913), 781.

The courts of this country hold, concurring in the British view, that where a situation is governed by the Sherman Act the *Mogul Case* is not applicable. *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290; *United States* v. *Addyston Pipe & Steel Co.*, 85 Fed. Rep. 271, 286; *Wheeler-Stenzel Co.* v. *National Window Glass Association*, 152 Fed. Rep. 864, 873.

On the evils of the "conferences" and deferred rebate system, as practiced by British ship-owners, and their use of "fighting ships," see Report of Committee on Merchant Marine, 63d Cong., vol. IV, p. 307. The policy of this country is recently and specifically expressed by the Shipping Board Act of September 7, 1916, 39 Stat. 728.

Mr. Thomas Thacher and *Mr. J. Parker Kirlin*, with whom *Mr. Charles R. Hickox* was on the briefs, for defendants in error:

Restraint of competition is restraint of trade only when unfavorable to trade or commerce, and therefore unreason-

able and prejudicial to the public interests. *United States* v. *Hamburg-American S. S. Line*, 216 Fed. Rep. 971; *United States* v. *Prince Line* and *United States* v. *American-Asiatic S. S. Co.*, 220 Fed. Rep. 230; *United States* v. *United States Steel Co.*, 223 Fed. Rep. 55; *Patterson* v. *United States*, 222 Fed. Rep. 599; *United States* v. *United Shoe Machinery Co.*, 222 Fed. Rep. 349; *United States* v. *International Harvester Co.*, 214 Fed. Rep. 987; *United States* v. *Keystone Watch Case Co.*, 218 Fed. Rep. 502. This is the view taken in the *Powder Trust Case*, 188 Fed. Rep. 339, 373. Such is the doctrine of this court. *Standard Oil Co.* v. *United States*, 221 U. S. 1; *United States* v. *American Tobacco Co.*, 221 U. S. 106; *United States* v. *Joint Traffic Association*, 171 U. S. 505.

The history of the Sherman Act shows a clear intent [80] on the part of Congress not to condemn contracts and combinations merely because they are in restraint of competition or merely because they operate to raise the cost of commodities to consumers. See also its title: "To protect trade and commerce." It looked to the development and increase of trade and commerce in the interest of the public, to the removal of obstacles to its growth and expansion. The combination must prejudice the public interests either by unduly restricting competition or by unduly obstructing the course of trade. *Standard Oil* and *Tobacco Cases*, *supra; Nash* v. *United States*, 229 U. S. 373, 376; *United States* v. *Terminal R. R. Association of St. Louis*, 224 U. S. 383; 236 U. S. 194; *United States* v. *Union Pacific R. R. Co.*, 226 U. S. 61; *Eastern States Retail Lumber Dealers' Association* v. *United States*, 234 U. S. 600, 609, 610.

Restriction of competition by the union of competing carriers, or an obstruction of the course of trade, is not undue, unless the result is to injure the public, by decreasing the facilities open to the public for trade or commerce, leading to a diminution of exchange of commodities or less favorable conditions for the development of trade or commerce. The emphasis is now put by the decisions of this court upon the words "undue" and "unreasonable," and these words are used with relation to the public interest. That which is the

ultimate concern in the constitutional grant of power over commerce, and in the exercise of such power by the Anti-trust Act, is the exchange and distribution of commodities.

This was recognized by Mr. Justice Peckham in the *Joint Traffic Association Case*, 171 U. S. 505. The paramount interest of the public is in the efficiency of the service to the public in transporting freight and passengers in aid of commercial intercourse.

This is recognized in the *St. Louis Terminal Association Case*, 224 U. S. 383, 394, and in the *Union Pacific Case*, [81] 226 U. S. 61, 88. See *Attorney General* v. *Adelaide Steamship Co.*, A. C. (1913) 781.

The question arising in this case becomes substantially the same as that which arose in the *Mogul Steamship Company Case*, A. C. (1892), 25, although the courts there dealt not with any statute, but with the common law. *Mogul Steamship Company Case*, 21 Q. B. D. 544, 548. See also *North-Western Salt Co.* v. *Electrolytic Alkali Co.*, 30 Law Times Rep. 313.

That to do business on the rebate or commission plan is not to monopolize or attempt to monopolize, see *In re Corning*, 51 Fed. Rep. 205; *In re Terrell*, 51 Fed. Rep. 213; *In re Greene*, 52 Fed. Rep. 104; *Whitwell* v. *Continental Tobacco Co.*, 125 Fed. Rep. 454.

The burden was on the plantiffs to prove an unlawful combination. It was error for the trial court to assume that an unlawful combination had been established as matter of law.

The principals were not shown to have combined as alleged; the evidence established the contrary. Neither did it appear, by undisputed evidence, as it must to justify the court's action, that the defendants (mere agents) were parties to the assumed combination. They had nothing to do with making any combination (whatever was done in that respect was done abroad), and nothing to do with the business except to carry out instructions from their London principals.

The assumed combination could not have been illegal under the act because it was formed, if formed anywhere, beyond

the jurisdiction of the United States. For this proposition we need only refer to *American Banana Co.* v. *United Fruit Co.*, 213 U. S. 347. If a partnership or corporation had been formed to own and operate the ships belonging to the original ship-owners, there would seem to be no room for doubt that its legality would not be affected by the Sherman Act. If, so uniting their [82] properties and business, these ship-owners had done business here in substantially the mode in which they are alleged to have done it, there could be no charge of an illegal combination or conspiracy under our law.

The proof showed that commerce was actually promoted. There was no proof that plaintiffs were injured. This was essential to a cause of action under § 7 of the act.

The Circuit Court erred in declining to charge the jury that the burden was on the plaintiffs to show that the rates were unreasonable; in not leaving the question of combination to the jury; in permitting the jury to consider supposititious profits that the plaintiffs claimed they would have made if they had followed a different course; and in permitting the plaintiffs during the trial to amend their complaint so as to set up a new cause of action.

MR. JUSTICE MCKENNA, after stating the case as above, delivered the opinion of the court.

A motion to dismiss the writ of error is made, two grounds being urged: (1) The Circuit Court of Appeals was without jurisdiction to allow the writ on March 15, 1912, for the reason that its judgment had become executed and the judgment entered thereon in the Circuit Court November 24, 1911, had become final and irrevocable before the petition for the writ was filed and the order allowed. (2) The judgment of the Circuit Court was entered in the form finally adopted at the request of plaintiffs and by their consent, and the errors assigned by plaintiffs were waived by such request and consent.

The argument to support the motion is somewhat roundabout. It gets back to the Circuit Court and charges that because that court had entered judgment on the original

mandate and had adjourned for the term without any application having been made to recall that [83] judgment and because no writ of error to review it was sought, the judgment became a final disposition of the case.

We are not concerned with what the Circuit Court might have done, but only with what the Circuit Court of Appeals did and the jurisdiction it possessed. It received and granted a petition for rehearing, ordered a recall of the mandate previously issued, set aside the judgment of the Circuit Court, and remanded the case with directions to dismiss the complaint. The plaintiffs did not consent to a judgment against them, but only that, if there was to be such a judgment, it should be final in form instead of interlocutory, so that they might come to this court without further delay.

Subsequently a petition for the writ of error was filed and allowed and all further proceedings upon the part of the defendants for the enforcement of the judgment were suspended and stayed until the final determination by this court upon the writ of error, in return to which the record was properly furnished. *Atherton* v. *Fowler*, 91 U. S. 143.

The motion to dismiss is denied.

The case in the courts below had a various fate, victory alternating between the parties but finally resting with defendants.

The plaintiffs, dissatisfied, have brought the case here. We are confronted at the outset, in view of the proceedings in the courts below, with contentions as to what questions of law or fact are before us.

Notwithstanding two trials and two appeals and reviews in the Circuit Court of Appeals, defendants insist the facts are yet in controversy. We cannot assent.

It will be observed from the excerpts from the opinions of the Circuit Court of Appeals that the case was decided upon the proposition of law that the combination charged against defendants was not in unreasonable restraint of [84] trade and that such character was necessary to make it illegal under the Federal Anti-Trust Act. As to the fact of combination and restraint and the means employed both

trial and appellate courts concurred, and their conclusion is not shown to be erroneous.

There is a contention that "there is not in the record any direct proof whatever of the terms of any conference or agreement participated in by any of the defendants. All that appears is that certain steamship owners consisting of firms, the identity of whose members is not established, operated steamers in the trade from New York to South African ports without competing with one another." But more than that appears, and it cannot be assumed that the circulars that were issued and the concerted course of dealing under them were the accidents of particular occasions having no premeditation or subsequent unity in execution. The contention did not prevail with the courts below and we are brought to the consideration of the grounds upon which the Circuit Court of Appeals changed its ruling, that is, that it was constrained to do so by the *Standard Oil* and *Tobacco Cases*, 221 U. S. 1, 106.

It is not contended that the facts of those cases or their decision constrained such conclusion, but only that they announced a rule which, when applied to the case at bar, demonstrated the inoffensive character of the combination of defendants. In other words, it is contended that it was decided in those cases that "the rule of reason" must be applied in every case "for the purpose of determining whether the subject before the court was within the statute," to quote the words of the opinion, and, as explained in subsequent cases, it is the effect of the rule that only such contracts and combinations are within the act as, by reason of their intent or the inherent nature of the contemplated acts, prejudice the public interest by unduly restricting competition or unduly obstructing the [85] course of trade. *Nash* v. *United States*, 229 U. S. 373, 376; *Eastern States Retail Lumber Dealers' Association* v. *United States*, 234 U. S. 600, 609.

But the cited cases did not overrule prior cases. Indeed, they declare that prior cases, aside from certain expressions in two of them[1] or asserted implications from them, were

[1] *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290; *United States* v. *Joint Traffic Association*, 171 U. S. 505.

examples of the rule and show its thorough adequacy to prevent evasions of the policy of the law "by resort to any disguise or subterfuge of form" or the escape of its prohibitions "by any indirection." And we have since declared that it cannot "be evaded by good motives," the law being "its own measure of right and wrong, of what it permits, or forbids, and the judgment of the courts cannot be set up against it in a supposed accommodation of its policy with the good intention of the parties and, it may be, of some good results." *Standard Sanitary Mfg. Co.* v. *United States*, 226 U. S. 20, 49; *International Harvester Co.* v. *Missouri*, 234 U. S. 199.

The rule condemns the combination of defendants, indeed, must have a stricter application to it than to the combinations passed on in the cited cases. The defendants were common carriers and it was their duty to compete, not combine; and their duty takes from them palliation, subjects them in a special sense to the policy of the law.

Their plan of evasion was simple and as effective as simple. They established a uniform freight rate, including in it what they called a primage charge. This charge was refunded subsequently, but only to shippers who shipped exclusively by the lines of the combining companies and who had not directly or indirectly made or been interested in any shipment by other vessels. And there was the further condition that the rebate was not [86] payable on the goods of any consignee who directly or indirectly imported goods by vessels other than those of the "conference"—to use the word employed by the witnesses to describe the combining companies. This loyalty on the part of the consignees was subsequently not exacted, but loyalty upon the part of shippers was continued to be required and its reward was the refunding of the primage charge. That the combination was effective both the lower courts agreed. Upon its extent they differed, the Court of Appeals considering that while it was in restraint of trade the restraint was reasonable and therefore not obnoxious to the law.

The Court of Appeals has not given us its reason for its conclusion. Counsel for defendants say that the *Standard*

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Oil and *Tobacco Cases* furnish the explanation, and that they support what the history of the act establishes, that it was the "clear intent upon the part of Congress not to condemn contracts and combinations merely because they are in restraint of competition or merely because they operate to raise the cost of commodities to consumers."

The argument that is employed to sustain the contention is one that has been addressed to this court in all of the cases and we may omit an extended consideration of it. It terminates, as it has always terminated, in the assertion that the particular combination involved promoted trade, did not restrain it, and that it was a beneficial and not a detrimental agency of commerce.

We have already seen that a combination is not excused because it was induced by good motives or produced good results, and yet such is the justification of defendants. They assert first that they are voluntary agencies of commerce, free to go where they will, not compelled to run from New York to Africa, and that, "unlike railroads, neither law, nor any other necessity, fixes them upon particular courses;" and therefore, it is asked, "who can say that otherwise than under the plan adopted, any of [87] the ships of the defendants would have supplied facilities for transportation of commodities between New York and South Africa during the time referred to in the complaint?" The resultant good of the plan, it is said, was "regularity of service, with steadiness of rates"; and that "the whole purpose of the plan under which the defendants acted was to achieve this result."

We may answer the conjectures of the argument by the counter one that if defendants had not entered the trade others might have done so and been willing to serve shippers without constraining them, been willing to compete against others for the patronage of the trade. And it appears from the testimony that certain lines so competed until they were taken into the defendants' combination.

Nor can it be said that under defendants as competitors or that under competing lines service would not be regular or rates certain, or, if uncertain, that they would be detrimentally so.

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That the combination was intended to prevent the competition of the lines which formed it is testified, and it cannot be justified by the conjectures offered by counsel; nor can we say that the success of the trade required a constraint upon shippers or the employment of "fighting ships" to kill off competing vessels which, tempted by the profits of the trade, used the free and unfixed courses of the seas, to paraphrase the language of counsel, to break in upon defendants' monopoly. And monopoly it was; shippers constrained by their necessities, competitors kept off by the "fighting ships." And it finds no justification in the fact that defendants' "contributions to trade and commerce" might "have been withheld." This can be said of any of the enterprises of capital and has been urged before to exempt them from regulation even when engaged in business which is of public concern. The contention has long since been worn out and it is established that the [88] conduct of property embarked in the public service is subject to the policies of the law.

It is contended that the combination, if there was one, was formed in a foreign country and that, therefore, it was not within the act of Congress; and that, besides, the principals in the combination and not their agents were amenable to the law. To this we do not assent. As was said by the Circuit Court of Appeals, the combination affected the foreign commerce of this country and was put into operation here. *United States* v. *Pacific & Arctic Ry. & Nav. Co.*, 228 U. S. 87. It, therefore, is within the law, and its managers here were more than simply agents—they were participants in the combination.

It is, however, contended that even if it be assumed the facts show an illegal combination, they do not show injury to the plaintiffs by reason thereof. The contention is untenable. Section 7 of the act gives a cause of action to any person injured in his person or property by reason of anything forbidden by the act and the right to recover threefold the damages by him sustained. The plaintiffs alleged a charge over a reasonable rate and the amount of it. If the charge be true that more than a reasonable rate was secured by the combination, the excess over what was reasonable was an element of injury. *Texas & Pacific Ry. Co.* v. *Abi-*

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lene Cotton Oil Co., 204 U. S. 426, 436. The unreasonableness of the rate and to what extent unreasonable was submitted to the jury and the verdict represented their conclusion.

The next contention is that the fact of combination should have been submitted to the jury and not decided as a matter of law by the court. We are unable to assent. There was no conflict in the evidence, nothing, therefore, for the jury to pass upon; and the court properly assumed the decision of what was done and its illegal effect.

It is next contended that the jury was permitted to consider as elements of damage supposititious profits. The [89] record does not sustain the contention. The profits were not left to speculation. There were different sums stated, resulting from the loss of particular customers, and the fact of their certainty was submitted to the judgment of the jury. They were told that they "ought not to allow any speculative damages," that they were not "required to guess" as to what damages "plaintiffs claim to have sustained." And, further, that the burden of proof was upon plaintiffs and that from the evidence the jury should be able to make a calculation of what the damages were. Besides, plaintiffs alleged an overcharge, and the verdict of the jury was for its amount and interest.

Two other contentions are made: (1) The court should have charged the jury that the burden was on the plaintiffs to show that the rates on their shipments were excessive and unreasonable. (2) The court erred in permitting plaintiffs to amend their complaint so as to set up a new cause of action.

(1) If there was error in this its effect is not appreciable. The record shows a most painstaking trial of the case on the part of counsel and the court, a full exposition of all of the elements of judgment and careful instructions of the court for their estimate. It would be going very far to reverse a case upon the effect of the bare abstraction asserted by the contention, even granting it could be sustained.

(2) Permitting the amendment of the complaint was not an abuse of the discretion which a court necessarily possesses.

The above are the main contentions of defendants. They make, besides, a contention comprehensive of all of the

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rulings against them; but to give a detailed review of such rulings would require a reproduction of the record, and we therefore only say that they have been given attention and no prejudicial error is discovered in them.

Judgment of the Circuit Court of Appeals is reversed and that of the Circuit Court is affirmed.

HENRY *v.* A. B. DICK COMPANY.[a] [b]

ON A CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 20. Argued October 27, 1911.—Decided March 11, 1912.

[224 U. S., 1.]

Complainant sold his patented machine embodying the invention claimed and described in the patent, and attached to the machine a license restriction that it only be used in connection with cer-

[a] This case was argued after the death of Mr. Justice Harlan, and during the absence of Mr. Justice Day. The opinion of the court was delivered by Mr. Justice Lurton, with whom Mr. Justice McKenna, Mr. Justice Holmes and Mr. Justice Van Devanter concurred; a dissenting opinion was delivered by Mr. Chief Justice White, with whom Mr. Justice Hughes and Mr. Justice Lamar concurred. After the opinion was delivered, the plaintiff in error asked leave to file a petition for rehearing, and *The Attorney General* and *The Solicitor General* filed an application and brief on behalf of the United States for leave to intervene and for a rehearing of the cause; both applications were denied.

[b] While this case and the cases of *Bauer* v. *O'Donnell,* (221 U. S., 1; *post,* p. 795), *Motion Picture Patents Co.* v. *Universal Film Co.* (243 U. S., 502; *post,* p. ——), and *Straus et al.* v. *Victor Talking Machine Co.* (243 U. S., 490; *post,* p. 810), arose under the Patent laws, they are printed herein for the reason that they define the extent of the monopoly granted under those laws with respect to the right of a patentee or licensee to control, after sale, the resale price of his patented article, or to restrict the materials to be used in its operation. The extent of this right becomes important in any suit under the Anti-Trust Laws wherein a defense is set up of a right claimed under a patent; and this is true notwithstanding the passage of the Clayton Act (38 Stat., 730) declaring contracts of such character unlawful.

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tain unpatented articles made by the vendor of the machine; with the knowledge of such license agreement and with the expectation that it would be used in connection with the said machine, defendant sold to the vendee of the machine an unpatented article of the class [2] described in the license restriction. *Held* that the act of defendant constituted contributory infringement of complainant's patent.[a]

This court does not prescribe the jurisdiction of courts, Federal or state, but only gives effect to it as fixed by law.

A suit for infringement which turns upon the scope of the patent and privileges of the patentee thereunder presents a case arising under the patent law.

In determining questions of jurisdiction this court never shirks the responsibility of maintaining the lines of separation defined in the Constitution and the laws made in pursuance thereof.

A patentee who has leased his patent to a licensee under restrictions may waive the tort involved in infringement and sue upon the broken contract; but in that event the case is not one arising under the patent laws and, in absence of diversity of citizenship, a Federal court has no jurisdiction thereof.

Whether the case is one of infringement, of which the Federal court has jurisdiction or of contract of which it has not jurisdiction, is often determined by the remedy which complainant seeks.

The test of jurisdiction is whether complainant does or does not set up a right, title or interest under the patent laws or make it appear that a right or privilege will be defeated by one, or sustained by another, construction of those laws.

Whether a patentee may lawfully impose restrictions on the use of a patent and whether the violation thereof constitutes infringement are questions under the patent law.

A patentee may elect to sue his licensee upon the broken contract, or for forfeiture for breach, or for infringement.

While an absolute and unconditional sale operates to pass the patented article outside of the boundaries of the patent, a patentee may by a conditional sale so restrict the use of his vendee within specific boundaries of time, place or method as to make prohibited uses outside of those boundaries constitute infringement and not mere breach of collateral contract.

The extent of a license to use, which is carried by a sale of a patented article depends upon whether any restrictions were placed upon the sale, and if so what they were, and how they were brought home to the vendee; and where, as in this case, a restriction is plainly placed upon the article itself, a sale carries with it only the right to use within the limits specified, and any other use is an infringing one.

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The patent statute is one creating and protecting a true monopoly granted to subserve a broad public policy, and it should be construed so as to give effect to a wise and beneficial purpose.

[8] The monopoly of a patent extends to the right of making, selling and using, and each is a separable and substantial right.

A patentee may exclude others from the use of his invention although he does not use it himself. *The Paper Bag Patent Case*, 210 U. S. 405.

Although a contract in regard to use of a patent may include interstate commerce and restrain interstate trade, if it involves only the reasonable and legal conditions imposed under the patent law, it is not within the prohibitions of the Sherman Act. *Bement* v. *National Harrow Co.*, 186 U. S. 70.

Contributory infringement is the intentional aiding of one person by another in the unlawful making, selling or using of a patented invention.

The larger right of exclusive use of the patentee embraces the lesser one of only permitting the licensee to use upon prescribed conditions.

Courts cannot declare the monopoly created by Congress under authority of the Constitution to be unwise; Congress alone has power to prescribe what restraints shall be imposed.

Where a great majority of the courts to which Congress has committed the interpretation of a law have construed it, so that the line of decisions has become a rule of property, this court should not, in the absence of clear reason to the contrary, overrule those decisions on certiorari, and so held in this case after reviewing the decisions sustaining the rule of contributory infringement.

A bare supposition that an article adapted for use in connection with a patented machine sold under restricted license is to be used in connection therewith will not make the vendor a contributory infringer, but where the article so sold is only adapted to an infringing use, there is a presumption that it is intended therefor.

Questions certified by Circuit Court of Appeals on appeal from 149 Fed. Rep. 424, answered in affirmative.

[56 L. Ed., 645.[a]]

[FEDERAL COURTS—JURISDICTION—CONTRACTS AFFECTING PATENTS.—1. An agreement arising from the purchase of a Rotary mimeograph subject to a license restriction that the machine may be used only with the stencil paper, ink, and other supplies made by the patentee, none of which are patented, is not collateral, so as to make its

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[a] The paragraphs following, in brackets, comprise the syllabus of the case as reported in vol. 56, p. 645, Lawyers Edition, Supreme Court Reports.

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validity dependent on principles of general law, of which a Federal court will have no jurisdiction.

[For other cases, see Courts, 556-561, in Digest Sup. Ct. 1908.]

COURTS—RULES OF DECISION.—2. The Supreme Court of the United States will not refrain from ruling that a patentee may sell a patented machine subject to restrictions as to its use, and predicate infringement on a use in violation of such restrictions, on the ground that such a ruling might draw to the Federal courts cases which otherwise would not come to them.

[For other cases, see Courts, 1613-1615, in Digest Sup. Ct. 1908.]

FEDERAL COURTS—JURISDICTION—INFRINGEMENT OF PATENT.

3. An action by the patentee of a Rotary mimeograph sold under a license restriction that such machine should be used only with the stencil paper, ink, and other supplies made by the patentee, none of which are patented, against one selling ink to the purchaser with the expectation that it would be used in connection with such mimeograph, is one arising under the patent laws, of which a Federal court has jurisdiction.

[For other cases, see Courts, 562-568, in Digest Sup. Ct. 1908.]

ELECTION OF REMEDIES—VIOLATION OF LICENSE RESTRICTION.—4. A patentee selling a Rotary mimeograph under a license restriction that it shall be used only with stencil paper, ink, and other supplies made by the patentee, may elect to sue for an infringement by the sale of ink to the purchaser with the expectation that it would be used in connection with such mimeograph, although he might have sued on the broken contract, or brought a bill to declare a forfeiture of the licensee's rights for breach of the implied covenant to operate it only in connection with the materials supplied by the patentee.

[As to choice of remedies, see Election of Remedies, III., in Digest Sup. Ct. 1908.]

FEDERAL COURTS — JURISDICTION — INFRINGEMENT OF PATENTS. — 5. Whether a patentee selling a Rotary mimeograph under a license restriction that it shall be used only with the stencil paper, ink, and other supplies made by the patentee, none of which are patented, thereby reserves to himself as patentee the exclusive right to all unpermitted uses which may be made of his invention as embodied in the machine sold, is a question arising under the patent laws, of which a Federal court has jurisdiction.

[For other cases, see Courts, 562-568, in Digest Sup. Ct. 1908.]

PATENTS—LICENSE RESTRICTIONS.—6. A license restriction may lawfully be imposed on the purchaser of a rotary mimeograph, that the machines sold may be used only with the stencil paper, ink, and other supplies made by the patentee, although they are all unpatented.

[For another case, see Patents, 840, in Digest Sup. Ct. 1908.]

Argument for Complainant.

STATUTES — PATENTS — MONOPOLY — LIBERAL CONSTRUCTION.—7. The statute creating and guarantying to an inventor the exclusive right to his patent will be so construed as to give effect to the broad public policy intended to be subserved in granting the monopoly.

[For other cases, see Statutes, 463–470, in Digest Sup. Ct. 1908.]

PATENTS—CONTRIBUTORY INFRINGEMENT.—8. The sale of ink to a purchaser of a Rotary mimeograph sold with a license restriction that it could be used only with the ink supplied by the patentee, with the expectation that the ink sold would be used in connection with such mimeograph, constitutes contributory infringement of the patent.

[As to what constitutes infringement of patent generally, see Patents, XIV. a, in Digest Sup. Ct. 1908.]

CASES CERTIFIED.—9. Defendants in an action for contributory infringement of a patented Rotary mimeograph by a sale of ink to the purchaser in violation of a license restriction that is should be used only with the ink made by the patentee cannot, where the facts certified to the United States Supreme Court state that they made a direct sale of the ink to the user of the patented article with knowledge that, under the license from the patentee, she could not use such ink in connection with the machine without infringement of the monopoly of the patent, and that the sale was made with the expectation that it would be used in connection with such mimeograph, claim that the sale of the ink was not an infringement as it might be used in a non-infringing way.]

[As to scope of inquiry in cases certified, see Cases Certified, 108–115, in Digest Sup. Ct. 1908.]

THE facts, which involve the power of a patentee to enforce a license restriction as to the use of the patented article, and the determination of what constitutes contributory infringement, are stated in the opinion.

Mr. Arthur V. Briesen, with whom *Mr. Antonio Knauth* was on the brief, for Henry:

The attempted restriction on the sale of the article is void at common law. *United States* v. *Sequi*, 10 Pet. 306; *United States* v. *Rodman*, 15 Pet. 130, 139; *Merrifield* v. [4] *Cobleigh*, 4 *Cush.* 178. See also *Packard* v. *Ames*, 16. *Gray*, 327; 6 Am. & Eng. Ency., 438, note 5.

By the common law, the absolute property in the article which passes upon an ordinary sale "denotes a full and complete title and dominion over it," which is incompatible with a continued control over it in some shape, matter or respect by the seller of the article. 2 Kent's Com., 14th ed.,

Argument for Complainant.

347; 2 Blackstone's Comm., 4th ed., 1, 154, 389, 446; Benjamin on Sales, 6th ed., 746.

The only kind of conditional sale known to our law is a sale in which the transfer of title to the things sold to the purchaser, or his retention of it, is made dependent upon the performance of some condition. The chief point of distinction between a condition subsequent and a covenant is that a breach of the former subjects the estate to a forfeiture; a breach of the latter is a ground for damages. Am. & Eng. Ency. Law, 503; *Jewett* v. *Lincoln*, 14 Maine, 116; *Green* v. *Bennett*, 23 Michigan, 464; and see *Park* v. *Hartman*, 153 Fed. Rep. 24; affirmed, 212 U. S. 588; *Taddy* v. *Sterious*, 1 Chan. 354; *McGruther* v. *Pitcher*, 2 Chan. 306 (1904).

The patent statute does not interfere with the working of the rule of the common law as applied to patented articles which have been sold by the patentee by an absolute sale passing the title, not conditionally, but absolutely. *Wilson* v. *Rousseau*, 4 How. 646; *Bloomer* v. *McQuewan*, 14 How. 539, 549; *Bloomer* v. *Millinzer*, 1 Wall. 340; *Chaffee* v. *Boston Belting Co.*, 22 How. 217–222; *Goodyear* v. *Beverly Rubber Co.*, 1 Cliff. 348, 354; *Mitchell* v. *Hawley*, 16 Wall. 544–547; *Adams* v. *Burke*, 17 Wall. 453; *Webber* v. *Virginia*, 103 U. S. 344, 348; *Paper Bag Cases*, 105 U. S. 766; *Hobbie* v. *Jennison*, 149 U. S. 355; *Morgan Envelope Co.* v. *Albany Paper Co.*, 152 U. S. 425; *Keeler* v. *Standard Folding Bed Co.*, 157 U. S. 659.

It must be admitted, however, that the question, whether a mere notice on the article restricting the right of sale by
[5] conditions as to price, can be enforced under the patent law in the absence of any agreement made by the purchaser, has not been decided by this court. *Bobbs-Merrill Co.* v. *Straus*, 210 U. S. 339, 343, and *Cortelyou* v. *Johnson*, 207 U. S. 196, are not authority, nor is *Bement* v. *Harrow Co.;* but see *Re Brosnahan, Jr.*, 18 Fed. Rep. 62.

If the patentee desires to secure to himself the continued control over the use of the patented article in the hands of others, he may do so by leasing it upon suitable conditions, terminating the lease in case of a breach of the con-

dition or by selling it under conditional sale, providing that upon breach of the condition, the title to the article will revert to the patentee. *Bill Publishing Co.* v. *Smythe*, 27 Fed. Rep. 914.

The leading cases in the courts below, *Button Fastener Co.* v. *Eureka Specialty Co.*, 77 Fed. Rep. 288, and *Courtelyou* v. *Johnson*, 145 Fed. Rep. 933, can be distinguished from the case at bar, as each was rendered upon a proper conditional sale at common law, while in this case no such conditional sale is found; and further, that it was sustainable as an action on contract.

Edison Phonograph Co. v. *Kaufmann*, 105 Fed. Rep. 960 was decided upon the supposed authority of *Dickerson* v. *Matheson*, 57 Fed Rep. 524, and *Dickerson* v. *Tingling*, 84 Fed. Rep. 192, 195, but there is no true analogy between a purchase in a foreign country and importation of the article into this country, treated in those cases and a purchase from the patentee in this country under "restrictions"; and see also *Edison Phonograph Co.* v. *Pike*, 116 Fed. Rep. 863.

In view of the statements of this court in the more recent decision of *Bobbs-Merrill Co.* v. *Straus*, *supra*, the statement of Judge Lowell concerning the approval by this court of the broad doctrines laid down in the *Button Fastener Case* must be considered doubtful; see *Green* v. *Bennett*, 23 Michigan, 464; 6 Am. & Eng. Ency. 437.

If the sale is to be considered a conditional sale which [6] can be rescinded upon breach of the condition, the seller cannot rescind the contract and at the same time retain the benefits of the contract. He must, as a condition precedent to rescission, restore or offer to restore the price paid for the goods. 35 Cyc. 144.

That this is not a suit arising under the patent statute, but one arising from the contract and having for its object the enforcement of the contract seems manifest both on principle and on authority. *Excelsior Pipe Co.* v. *Pacific Bridge Co.*, 185 U. S. 282.

The license restriction is void because unreasonable and tending to create an unlawful, permanent monopoly in the patentee in something which is not protected by his patent.

Argument for Defendant.

The notice of restriction is not connected with any patent or patents, nor is there any time limit stated as to the obligation of the purchaser of the machine to buy the supplies for it only from the complainant, which supplies are not even completely enumerated, and may comprise oil, blotting paper, rollers, copying paper, and anything else which may be useful in the handling of the machine. *Cortelyou* v. *Johnson*, 145 Fed. Rep. 933; *Morgan Envelope Co.* v. *Albany Paper Co.*, 152 U. S. 425.

Machines like the mimeograph are not purchased with the amount of care and circumspection with which a piece of real estate is purchased; they are ordinary articles of trade like any other hand machines and the purchaser very likely either pays no attention to the notice of restriction, or if he does see it, will think that it is impossible to insist on such a condition, because the maker of the machines cannot possibly follow them into the hands of many thousands of purchasers to watch over their use.

A court of equity should never by injunction imply obligations on one party, when there are no clear and definite obligations imposed upon the other party to the contract. *Lawrence* v. *Dixey*, 119 App. Div. (N. Y.) 295; *Chicago Railroad Company* v. *Dane*, 43 N. Y. 240; *Rafolo*[7]*vitz* v. *American Tobacco Co.*, 73 Hun, 87; *Jackson* v. *Alpha Portland Cement Company*, 122 App. Div. (N. Y.) 345.

Mr. Frederick P. Fish, with whom *Mr. Samuel Owen Edmonds* was on the brief, for A. B. Dick Co.:

Under Art. I, § 8, of the Constitution, Congress is given power to promote the progress of science and useful arts by securing to inventors, for limited terms, the "exclusive" right to their discoveries. Accordingly, § 4884 of the Revised Statutes provides that the grant of a patent shall vest in the patentee "the exclusive right to make, use and vend the invention or discovery." This is, in effect, the grant of three separable substantial rights, each vested exclusively in the patentee. *Bloomer* v. *McQuewan*, 14 How. 538; *Adams* v. *Burke*, 17 Wall. 453.

A patentee is under no obligation to exercise any of the exclusive rights covered by his grant. Doing nothing thereunder himself he may still, during the patent term, exclude

others from making, or using, or selling the patented thing. *Paper Bag Patent Case*, 210 U. S. 405; *Bement* v. *Harrow Co.*, 186 U. S. 70. This is an incident of his ownership, for a limited period, of a true but lawful monopoly authorized by the Constitution and statute. *Wilson* v. *Rousseau*, 4 How. 674; *Button Fastener Case*, 77 Fed. Rep. 294.

If, on the other hand, the patentee elect to exercise the rights so vested in him exclusively by the grant of the patent, it rests with him, and with him only, to determine the manner in which the value of those rights shall be realized. He may manufacture, or use, or sell the patented thing, or he may license others to do these things or any of them. Having the right wholly to exclude others, he may waive it to such extent and for such consideration as he sees fit. Cases *supra*.

If the patentee elect not to manufacture, he may retain the machine so made and himself exclusively enjoy its use. [8] Or, on such terms and under such conditions as he sees fit to impose, he may waive his exclusive right of use or some particular part of it, and permit such use by others to a definite extent, fixed by agreement. If he sell the machine outright and unconditionally, it passes out from under the patent monopoly, which thenceforth is ineffective to control its use. On the other hand, if he sell it conditionally or under license governing its use, the patentee thereby carves out from his exclusive right of use, and transfers, merely a limited right to use the patented machine in the manner which the license prescribes. Such use is protected by the patent. Any other use violates it and constitutes infringement. *Providence Rubber Co.* v. *Goodyear*, 9 Wall. 788; *Mitchell* v. *Hawley*, 16 Wall. 544; *Birdsell* v. *Shaliol*, 112 U. S. 485; *Bement* v. *Harrow Co.*, *supra*.

The market for standard and unpatented articles is established. That for a patented article the patentee must create. The particular method selected must be such as will bring him his return within the limited term of the patent. Outright sale at high price limits the market, injuring both patentee and public. Accountings in the form of rental or according to quantum of product are vexatious. When the

Argument for Defendant.

method satisfies both patentee and public, it does not lie in the mouth of a stranger to the transaction to complain.

On all sales of patented articles a license to use is a necessity. In the case of an outright sale, such license is *implied.* *Adams* v. *Burke, supra.* In the case of a sale under conditions governing use, the license, as in the case at bar, is *express.* Attack upon such a license assails the freedom of the parties to contract with respect to the patent monopoly. *Button Fastener Case, supra.*

The complainant-appellee, A. B. Dick Company, owner of the patents covering the rotary mimeograph, had the right to exclude all others from using those machines in any manner whatever. It might lawfully have withheld [9] them from the public until the expiration of the patents. It was quite within its rights, therefore, when it sold its machines under license restriction precluding lawful use thereof save with supplies (such as ink) of its own manufacture. Operating under such license, the vendees shared the patent monopoly with the patentee. Operating in defiance of it, they violated that monopoly.

Unlicensed use, even the threat of unlicensed use, of a patented machine constitutes infringement. And one who aids or abets such infringement, as by knowingly furnishing the means for the unlicensed use and thereby procuring such use, is liable as a tort-feasor and equally guilty of infringement. Suit, under the patent, lies against either or both the direct and the contributory infringer. *Button Fastener Case, supra; Kalem Co.* v. *Harper Bros.*, 222 U. S. 55.

The license in question is reasonable and necessary for the protection of the parties. The machines were sold at cost. They were therefore purchased by many who, had a manufacturing profit been added, would have been unable to enjoy the patented inventions. The patentee's profits on the supplies represented royalty; this accrued only in proportion to the licensee's use of his machine. An accounting on any other basis would have been vexatious to both parties. By using the patentee's specially adapted supplies, licensees obtained work of high quality and the reputation and prestige of the machine were preserved.

Argument for Defendant.

The injunction granted below does not stop the defendants from selling supplies but from procuring the licensees to infringe by selling such supplies to them, with knowledge of their license and with intent that the same shall be violated by the unlawful use of such supplies upon their licensed machines.

There is no substance in the suggestion that the license plan in question expands the scope of the patent, making it cover articles otherwise unpatented and possibly un- [10] patentable. If this were true, complainant would have the exclusive right to manufacture, use and sell the ink complained of. It claims no such right. All it claims is the right to make the ink which its licensees agreed to use when they employ the patented machines.

Equally without foundation is the suggestion as to monopolizing unpatented articles. The public never had the right to sell supplies for use on the patented machines. This being true, it is deprived of no right when complainant licenses the use of those machines only with its own supplies. Except where the use of the supplies will constitute or procure a tort, the public is as free to make and sell them to-day as it ever has been.

As to the fanciful suggestions concerning what other patentees may do in the way of imposing license restrictions, these are without weight or persuasiveness. If a restriction be unduly onerous or burdensome, one who would otherwise become a licensee may decline the license. He is not compelled to purchase. The whole matter is, *ex necessitate*, self-regulating. The public is safeguarded by the self-interest of the patentee, who can be depended upon not to throttle his market by imposing burdensome restrictions.

Additional authorities urged in complainant's behalf are *National Phonograph Co.* v. *Schlegel*, 128 Fed. Rep. 733; *Rubber Tire Case*, 154 Fed. Rep. 358; *Indiana Co.* v. *Case Co.*, 154 Fed. Rep. 365; *Æolian Co.* v. *Juelg*, 145 Fed. Rep. 939, and 155 Fed. Rep. 119; *Brodrick* v. *Mayhew*, 131 Fed. Rep. 92, and 137 Fed. Rep. 596; *Brodrick* v. *Roper*, 124 Fed. Rep. 1019; *Commercial Co.* v. *Autolox Co.*, 181 Fed. Rep. 387; *Cortelyou* v. *Lowe*, 111 Fed. Rep. 1005; *Cortelyou* v. *Carter's Ink Co.*, 118 Fed. Rep. 1022; *Cortelyou* v. *Johnson*,

138 Fed. Rep. 110; *Crown &c. Co.* v. *Brooklyn &c. Co.*, 172 Fed. Rep. 225; *Same* v. *Standard Brewery*, 174 Fed. Rep. 252; *Dick Co.* v. *Milwaukee Co.*, 168 Fed. Rep. 930; *Edison* v. *Kaufmann*, 105 Fed. Rep. 960; *Same* [11] v. *Pike*, 116 Fed. Rep. 863; *New Jersey Co.* v. *Schaefer*, 144 Fed. Rep. 437, 159 Fed. Rep. 171, and 178 Fed. Rep. 276; *New Jersey Co.* v. *Weinberg*, 183 Fed. Rep. 588; *Rupp* v. *Elliott*, 131 Fed. Rep. 730; *Victor Co.* v. *The Fair*, 123 Fed. Rep. 424. The English authorities are cited in the decision of the Privy Council in *National Phonograph Co.* v. *Menck*, 27 T. L. R. 239.

MR. JUSTICE LURTON delivered the opinion of the court.

This cause comes to this court upon a certificate under the sixth section of the Court of Appeals Act of March 31, 1891.

The facts and the questions certified, omitting the terms of the injunction awarded by the Circuit Court, are these:

"This action was brought by the complainant, an Illinois corporation, for the infringement of two letters patent, owned by the complainant, covering a stencil-duplicating machine known as the 'Rotary Mimeograph.' The defendants are doing business as co-partners in the City of New York. The complainants sold to one Christina B. Skou, of New York, a Rotary Mimeograph embodying the invention described and claimed in said patents under license which was attached to said machine, as follows:

"LICENSE RESTRICTION.

"This machine is sold by the A. B. Dick Co. with the license restriction that it may be used only with the stencil paper, ink and other supplies made by A. B. Dick Company, Chicago, U. S. A.

"The defendant, Sidney Henry, sold to Miss Skou a can of ink suitable for use upon said mimeograph with knowledge of the said license agreement and with the expectation that it would be used in connection with [12] said mimeograph. The ink sold to Miss Skou was not covered by the claims of said patent."

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"QUESTION CERTIFIED.

"Upon the facts above set forth the question concerning which this court desires the instruction of the Supreme Court is:

"Did the acts of the defendants constitute contributory infringement of the complainant's patents?"

There could have been no contributory infringement by the defendants, unless the use of Miss Skou's machine with ink not made by the complainants would have been a direct infringement. It is not denied that she accepted the machine with notice of the conditions under which the patentee consented to its use. Nor is it denied that thereby she agreed not to use the machine otherwise. What defendants say is that this agreement was collateral, and that its validity depended upon principles of general law, and that if valid the only remedy is such as is afforded by general principles of law. Therefore, they say that the suit is not one arising under the patent law, and one not cognizable in a Federal court, unless diversity of citizenship exists.

But before coming to the question whether this is a suit of which the Circuit Court had jurisdiction as a suit arising under the patent law, it may be well to notice an argument against jurisdiction based upon the suggestion that if a breach of such a license restriction will support a suit for infringement, direful results will follow. Chief among the results suggested are, an encroachment upon the authority of the state courts and an extension of the jurisdiction of the Federal courts. And to swell the grievance it is said that if it be held that a breach of such a restriction will support a suit for infringement, parties will be deprived of the right to have the validity and import of the license restriction determined by the general law, [13] and be compelled to have their rights determined by the patent law.

We are unable to assent to these suggestions. We do not prescribe the jurisdiction of courts, Federal or state, but only give effect to it as fixed by law. If a bill asserts a right under the patent law to sell a patented machine subject to restrictions as to its use, and alleges a use in violation of the restrictions as an infringement of the patent, it presents a question of the extent of the patentee's privilege, which, if

determined one way, brings the prohibited use within the provisions of the patent law, or, if determined the other way, brings into operation only principles of general law. Obviously, a suit for infringement, which must turn upon the scope of the monopoly or privilege secured to a patentee, presents a case arising under the patent law. The jurisdiction of the Circuit Court over such cases has, for more than a century, been *exclusive*, by the express terms of the statute, although, for the most part, its jurisdiction over other kinds of suits arising under the Constitution and laws of the United States is only concurrent with that of the state courts.

The suggestion, therefore, that we should refrain from ruling that a patentee may sell a patented machine subject to restrictions as to its use, and may predicate infringement upon a use in violation of the restrictions lest such a ruling may draw to the Federal courts cases which otherwise would not come to them, cannot be sustained without placing our decision upon considerations which are quite apart from the law. This, of course, we may not do. In determining questions of jurisdiction, this court has never shirked the responsibility of maintaining the lines of separation defined in the Constitution and the laws made in pursuance thereof, but, on the contrary, has been ever watchful to maintain those lines as obligatory alike upon all courts and all suitors.

[14] We come, then, to the question, whether a suit for infringement is here presented.

That the license agreement constitutes a contract not to use the machine in a prohibited manner, is plain. That defendants might be sued upon the broken contract, or for its enforcement or for the forfeiture of the license, is likewise plain. But if by the use of the machine in a prohibited way Miss Skou infringed the patent, then she is also liable to an action under the patent law for infringement. Now that is primarily what the bill alleged, and this suit is one brought to restrain the defendants as aiders and abettors to her proposed infringing use.

That the patentee may waive the tort and sue upon the broken contract, or in assumpsit, is elementary. Robinson on Patents, §§ 1225, 1250, and notes; *Steam Stone Cutter*

Co. v. *Sheldons*, 15 Fed. Rep. 608; *Pope Mfg. Co.* v. *Owsley*, 27 Fed. Rep. 100; *Button Fastener Cases*, 77 Fed. Rep. 288, 291; *Wilson* v. *Sandford*, 10 How. 99. But if the patentee elect to waive the tort and sue upon the covenants or for a breach of contract, the suit would not be one dependent upon or arising out of the patent law, and a Federal court would have no jurisdiction unless diversity of citizenship existed. Robinson on Patents, § 1250; *Magic Ruffle Co.* v. *Elm City Co.*, 13 Blatchf. 151; *Goodyear* v. *Union India Rubber Co.*, 4 Blatchf. 63; *Goodyear* v. *Congress Rubber Co.*, 3 Blatchf. 449. This would be so although the damages for a breach would be measured by the loss resulting from the infringement. *Magic Ruffle Co.* v. *Elm City Co.*, 13 Blatchf. 151. After such a recovery in assumpsit, no further damages for the infringement can be claimed. *Steam Stone Cutter Co.* v. *Sheldons*, 15 Fed. Rep. 608.

The remedy which the complainant seeks may often determine whether the suit is one arising under the patent law and cognizable only in a court of the United States, or one upon a contract between the patentee and his assigns or licensees, and, therefore, cognizable only in a [15] state court, unless there be diversity of citizenship. Thus, a bill to enforce a contract concerning the title to a patent, or an interest therein, or to declare a forfeiture of an assignment of an interest in a patent, or even a license to make, sell or use the patented thing, or an action to recover damages for a breach of a contract relating to a patent or a license thereunder, would not, because of the character of remedy or relief sought, be a suit cognizable in a United States court, although the facts stated might have justified a suit for infringement in a United States court, if the complainant had elected that remedy. To sustain the contention that a breach of the implied agreement not to use the machine in question except in a particular way might have supported a suit to forfeit the license, or an action for damages upon the broken contract, counsel have cited and commented at great length upon the cases of *Wilson* v. *Sandford*, 10 How. 99; *Dale Tile Mfg. Co.* v. *Hyatt*, 125 U. S. 46; *Albright* v. *Teas*, 106 U. S. 613; *Hartell* v. *Tilghman*, 99 U. S. 547; *Pratt* v. *Paris Gaslight*

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& Coke Co., 168 U. S. 255; *Keeler* v. *Standard Folding Bed Co.*, 157 U. S. 659, and *Bement* v. *National Harrow Co.*, 186 U. S. 70; but an examination of these cases will disclose that while in some of them a suit for infringement might have been brought, the complainants had in fact brought suits to set aside or enforce contracts relating to patents, or licenses under patents. They were, therefore, not "Patent cases," but cases determinable upon principles of general law. In *Excelsior Wooden Pipe Co.* v. *Pacific Bridge Co.*, 185 U. S. 282; Mr. Justice Brown reviews the cases and shows so plainly why they were not patent cases that we shall only refer to that opinion.

To support their contention that the only remedy for a violation of the license under which Miss Skou acquired her machine is one in the state courts, counsel quote a paragraph from the same opinion in these words: "Now, it may be freely conceded that if the licensee had failed to [16] observe any one of the three conditions of the license, the licensor would have been obliged to resort to the state courts, either to recover the royalties or to procure a revocation of the license. Such suit would not involve any question under the patent law." But the three conditions of the license there referred to were: First, to pay royalties; second, that the transferee would not transfer or assign the license without consent of the licensor; third, that the failure to use the license in the manufacture of pipe should operate to revoke it. It is evident that the licensee would not have infringed the patent by either failing to pay royalties, by assigning the license, or by neglecting to use his privilege. The licensor would clearly have been compelled to rely wholly upon his contract, as such, in any suit for the violation of any of the conditions named.

The test of jurisdiction is this: Does the complainant "set up some right, title or interest under the patent laws of the United States, or make it appear that some right or privilege will be defeated by one construction, or sustained by another, of those laws?" *Excelsior Wooden Pipe Co.* v. *Pacific Bridge Co.*, 185 U. S. 282; *Pratt* v. *Paris Gaslight & Coke Co.*, 168 U. S. 255, 259; *White* v. *Rankin*, 144 U. S. 628.

The bill alleges that the complainant's patent has been infringed by the breach of the conditions upon which the patented machine was sold. The remedy it seeks is an injunction against indirect infringement by the defendants. The facts stated upon the face of the bill may be insufficient to show an infringement of the patent; but the right to treat the conduct of the defendants as an indirect infringement is a right which the complainant sets up as arising under the patent law. One construction of the scope of the grant will sustain the rights asserted, if the facts be as alleged, and another will defeat those rights.

[17] Whether a patentee may lawfully impose such restrictions, and whether their violation constitutes an infringement, are obviously questions arising under the patent law. In *Littlefield* v. *Perry*, 21 Wall. 205, 222, this court said: "An action which raises a question of infringement is an action arising 'under the law,' and one who has the right to sue for the infringement may sue in the Circuit Court. Such a suit may involve the construction of a contract as well as the patent, but that will not oust the court of its jurisdiction. If the patent is involved it carries with it the whole case."

Although the complainant might have sued upon the broken contract, or brought a bill to declare a forfeiture of the licensee's rights for breach of the implied covenant to operate it only in connection with materials supplied by it, it has elected to sue for infringement. To quote from Judge Shipman's opinion in *Magic Ruffle Co.* v. *Elm City Co.*, 13 Blatchf. 151, "It was competent for the complainants to take either one of the two remedies. . . . They could bring a bill alleging an injury to their exclusive rights under the laws of the United States, or, as the residence of the parties gave this court jurisdiction, could bring a proper suit, setting up a breach of the contract as the gravamen of their action."

That a patentee may effectually restrict the time, place or manner of using a patented machine, so that a prohibited use will constitute an infringement of the patent, is fully conceded. Thus, in the printed brief counsel for defendants say: "Aside from such special contracts, an agreement that

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the article shall be used only in a certain manner, can be made only by way of lease of the article, terminating the lease upon condition broken, or by way of conditional sale, by breach of which the title reverts to the seller." In either such case, counsel say, "'a use of the article in violation of the condition may terminate the lease or sale of the article [18] (which) would become the property of the patentee again, and a use thereof by the lessee or purchaser may constitute a violation of the patent, for which an infringement may lie. . . . He cannot make a sale with the condition attached that the article shall be used or disposed of in a certain manner, leaving the title, however, in the purchaser in case of a breach of the condition."

The books abound in cases upholding the right of a patentee owner of a machine to license another to use it subject to any qualification in respect of time, place, manner or purpose of use which the licensee agrees to accept. Any use in excess of the license would obviously be an infringing use and the license would be no defense. Robinson on Patents, §§ 915, 916 and notes. This is so elementary we shall not stop to cite cases.

The contention is not that a patentee may not permit the use of a patented thing with such qualifications as he sees fit to impose, and that a prohibited use will be an infringing one, but that he can only keep the article within the control of the patent by retaining the title. To put the contention in another form—it is, that any transfer of the patentee's property right in a patented machine carries with it the right to use the entire invention so long as the identity of the machine is preserved, irrespective of any restrictions placed by the patentee upon the use of the article and accepted by the buyer. It is said that by such a sale the patentee "disposes of all his rights under his patent, and thereby removes the article from the operation of the patent law." If he attempts to sell the machine for specified uses only and prohibit all others, the restriction is disposed of as constituting a collateral agreement such as any vendor of personal property might impose, and enforceable, if valid at all, only as a collateral contract.

The issue is a plain one. If it be sound, it concludes the case, and our response should be a negative one, since [19] the violation of a mere collateral contract, which is not also an infringement of the patent would not be a case arising under the patent law. But is it true that where a patentee sells his patented machine for a specific and limited use, he does not thereby reserve to himself, as patentee, the exclusive right to all unpermitted uses which may be made of his invention as embodied in the machine sold? Obviously, this is a question arising under the patent law. By a sale of a patented article subject to no conditions the purchaser undeniably acquires the right to use the article for all the purposes of the patent so long as it endures. He may use it where, when, and how he pleases, and may dispose of the same unlimited right to another. This has long been the settled doctrine of this and all patent courts. *Mitchell* v. *Hawley*, 16 Wall. 544; *Livingston* v. *Woodworth*, 14 How. 546, 550; *Adams* v. *Burks*, 17 Wall. 453, 456; *Folding Bed Case* (*Keeler* v. *Standard Folding Bed Co.*), 157 U. S. 659, 666. By such an unconditional sale of the thing patented it is said to be "no longer within the limits of the monopoly. It passes outside of it, and is no longer under the protection of the act of Congress."

In the cases cited above, as well as in the leading case of *Bloomer* v. *McQuewan*, 14 How. 539, the statement that a purchaser of a patented machine has an unlimited right to use it for all the purposes of the invention, so long as the identity of the machine is preserved, was made of one who bought unconditionally, that is, subject to no specified limitation upon his right of use. The question of the effect of limitations upon the right of use arose, however, in *Mitchell* v. *Hawley*, and there we find the distinction was deemed material and the effect declared.

In that case one Taylor was the patentee, under a grant for a term of fourteen years, for a machine for felting hats. By what Mr. Justice Clifford calls "a conveyance of license, subject to certain restrictions or limitations," [20] one Bayley was given the "exclusive right to make and use and to license to others the right to use the said machines in the

States of Massachusetts and New Hampshire, during the remainder of the original term of said letters-patent," subject to a stipulation that "the licensee shall not in any way, or form, dispose of, sell, or grant any license to use the said machines beyond the expiration of the original term." There was also a provision that if the term of the patent should be extended Bayley should have the right to control the same in those two States, upon paying a reasonable compensation, etc.

Bayley, as such licensee, made and sold four machines to the appellant Mitchell, with the right to use them for felting hats in the town of Haverhill, Massachusetts, "under Taylor's patent bearing date May 3, 1864." Before the patent expired it was extended for the further term of seven years, the benefits of which extension for the said two States were assigned to the appellee Hawley. Hawley then filed his bill to restrain Mitchell from using the four identical machines which had been sold to him by Bayley. From a decree restraining their further use Mitchell appealed. Mr. Justice Clifford, before stating the facts upon which the judgment must rest as to the right of Mitchell as the purchaser of the machines to continue their use after the expiration of the original term of Taylor's patent, and after directing attention to what he termed "the well-grounded distinction between the grant of the right to make and vend the patented machine and the grant of the right to use it," which, he says, "was first satisfactorily pointed out by the late Chief Justice Taney, with his accustomed clearness and precision," says (p. 548):

"Purchasers of the exclusive privilege of making or vending the patented machine hold the whole or a portion of the franchise which the patent secures, depending upon the nature of the conveyance, and of course the interest [21] which the purchaser acquires terminates at the time limited for its continuance by the law which created the franchise, unless it is expressly stipulated to the contrary. But the purchaser of the implement or machine for the purpose of using it in the ordinary pursuits of life stands on different grounds, as he does not acquire any right to construct another machine either for his own use or to be vended to another for any purpose. Complete title to the implement or machine purchased becomes vested in the vendee by the

sale and purchase, but he acquires no portion of the franchise, as the machine, when it rightfully passes from the patentee to the purchaser, ceases to be within the limits of the monopoly."

In the succeeding paragraph he, in effect, limits what was above said to unconditional sales of such patented machines by adding this:

"Patented implements or machines sold to be used in the ordinary pursuits of life become the private individual property of the purchasers, and are no longer specifically protected by the patent laws of the State where the implements or machines are owned and used. Sales of the kind may be made by the patentee with or without conditions, as in other cases, but where the sale is absolute, and without any conditions, the rule is well settled that the purchaser may continue to use the implement or machine purchased until it is worn out, or he may repair it or improve upon it as he pleases, in same manner as if dealing with property of any other kind."

The force and bearing of this opinion cannot be escaped by suggesting that the court was referring to mere common-law contractual conditions, for the suit was to restrain infringement by the use of four machines which had been sold, *not leased.*

That the bill was one alleging and seeking to enjoin further use as an infringement of the patent is shown by the statement that "they," referring to the purchaser [22] Mitchell and those associated with him, "appeared to the suits and filed an answer setting up as a defense to the charge of infringement that they are by law authorized to continue the use of the four machines just the same under the extended letters-patent as they had the right to do under the original patent, when the purchase was made by those under whom they claim, which is the only question in the case."

The question argued, as shown by the brief, as set out in the report, was there, as here, that by a sale of the machines "they were taken out of the reach of the patent law altogether, and that as long as the machines themselves lasted, the owner could use them." For the patentee it was urged that "the right to make and use and to license others to use was expressly limited by apt words, showing clearly an intent that it should not survive the original term of the patent." This latter was the argument which prevailed. Mr. Justice Clifford, after referring to the principle of law that

one cannot convey a better title or right than he has, said (p. 550), touching the restriction imposed by Bayley on the machines sold by him to Mitchell:

"The form of the license which he gave to the purchasers shows conclusively that he understood that he was not empowered to give a license which should extend beyond that limitation."

Later, referring to this sale with license to use, the learned Justice says (p. 551):

"The terms of the license which the seller gave to the purchasers were sufficient to put them upon inquiry, and it is quite obvious that the means of knowledge were at hand, and that if they had made the least inquiry they would have ascertained that their grantor could not give them any title to use the machine beyond the period of fourteen years from the date of the original letters-patent, as he was only a licensee and never had any power to sell a machine so as to withdraw it indefinitely from the operation of the franchise secured by the patent."

[23] The distinction between the sale of a machine free from specific restrictions upon the right of use and a sale subject to such limitations becomes the more evident, in view of the fact that but for the license to use only for the remainder of the original patent term the purchaser would have acquired the right to continue the use during an extended term of the same patent. This was the express holding in the two prior cases of *Wilson* v. *Rousseau*, 4 How. 646, and *Bloomer* v. *McQuewan*, 14 How. 539, where the unlimited right of use by an unconditional purchaser was laid down in the strongest terms, and which cases are now relied upon by counsel in this case as equally applicable to a sale subject to a restricted use.

It is obvious that if Taylor, the patentee, could authorize Bayley to make and sell the patented machines, subject to the restriction that he should not sell for use beyond the terms of the original patent, and that a purchaser of the machines so made and sold by Bayley, with notice, would infringe the extended patent by a use after the original term had expired, it is because the exclusive right of the patentee embraces the right to make and sell patented machines subject to restrictions upon the right of use, which, if not observed, will support an action for infringement.

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An absolute and unconditional sale operates to pass the patented thing outside the boundaries of the patent, because such a sale implies that the patentee consents that the purchaser may use the machine so long as its identity is preserved. This implication arises, first, because a sale without reservation, of a machine whose value consists in its use, for a consideration, carries with it the presumption that the right to use the particular machine is to pass with it. The rule and its reason is thus stated in Robinson on Patents, § 824:

> "The sale must furthermore be unconditional. Not only may the patentee impose conditions limiting the use of the patented article, [24] upon his grantees and express licensees, but any person having the right to sell may at the time of sale restrict the use of his vendee within specific boundaries of time or place or method, and these will then become the measure of the implied license arising from the sale."

The argument for the defendants ignores the distinction between the property right in the materials composing a patented machine, and the right to use for the purpose and in the manner pointed out by the patent. The latter may be and often is the greater element of value, and the buyer may desire it only to apply to some or all of the uses included in the invention. But the two things are separable rights. If sold unreservedly the right to the entire use of the invention passes, because that is the implied intent; but this right to use is nothing more nor less than an unrestricted license presumed from an unconditional sale. A license is not an assignment of any interest in the patent. It is a mere permission granted by the patentee. It may be a license to make, sell and use, or it may be limited to any one of these separable rights. If it be a license to use, it operates only as a right to use without being liable as an infringer. If a licensee be sued, he can escape liability to the patentee for the use of his invention by showing that the use is within his license. But if his use be one prohibited by the license, the latter is of no avail as a defense. As a license passes no interest in the monopoly, it has been described as a mere waiver of the right to sue by the patentee. Robinson on Patents, §§ 806, 808.

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We repeat. The property right to a patented machine may pass to a purchaser with no right of use, or with only the right to use in a specified way, or at a specified place, or for a specified purpose. The unlimited right of exclusive use which is possessed by and guaranteed to the patentee will be granted if the sale be unconditional. But if the right of use be confined by specific restriction, the use not permitted is necessarily reserved to the patentee. [25] If that reserved control of use of the machine be violated, the patent is thereby invaded. This right to sever ownership and use is deducible from the nature of a patent monopoly and is recognized in the cases.

In *Sawin* v. *Guild*, 1 Gall. 485, Mr. Justice Story, as far back as 1813, recognized the distinction by holding that a sale of patented machines under an execution against the patentee did not render the sheriff liable under a statute which made any person liable who should sell a patented device without consent of the patentee, because the sheriff had merely sold the materials and had not undertaken to pass any right of use. But in *Wilder* v. *Kent*, 15 Fed. Rep. 217, it was held that under such an execution sale there passed whatever right of use the debtor had if the sale was unconditional.

Judge Lowell, in *Porter Needle Co.* v. *National Needle Co.*, 17 Fed. Rep. 536, after saying that an absolute and unqualified sale of a patented machine carried with it the right of use, said:

"But the mere value of a patented machine is often, as is proved to be in this case, insignificant in comparison with the value of its use; and the courts have permitted a severance of ownership and right of use, if the patentee has chosen to dissever them and if his intent is not doubtful."

It is plain from the power of the patentee to sub-divide his exclusive right of use that when he makes and sells a patented device that the extent of the license to use which is carried by the sale must depend upon whether any restriction was placed upon the use and brought home to the person acquiring the article.

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That here the patentee did not intend to sell the machine made by it subject to an unrestricted use is of course undeniable from the words upon the machine, viz:

"LICENSE RESTRICTION."

"This machine is sold by the A. B. Dick Co., with the [26] license restriction that it may be used only with the stencil, paper, ink and other supplies made by A. B. Dick Co."

The meaning and purpose of this restriction was that while the property in the machine was to pass to the purchaser, the right to use the invention was restricted to use with other articles required in its practical operation, supplied by the patentee. It was stated at the bar, and appears fully in the opinion of Judge Ray (149 Fed. Rep. 424), who decided the case in the Circuit Court, that the patentee sold its machines at cost, or less, and depended upon the profit realized from the sale of other non-patented articles adapted to be used with the machine, and that it had put out many thousands of such machines under the same license restriction. Such a sale, while transferring the property right in the machine, carries with it only the right to use it for practicing the invention according to the terms of the license. To no other or greater extent does the patentee consent to the use of the machine. When the purchaser is sued for infringement by using the device, he may defend by pleading, not the general and unlimited license which is carried by an unconditional sale, but the limited license indicated by the metal tablet annexed to the machine. If the use is not one permitted, it is plainly an infringing use.

If, then, we assume that the violation of restrictions upon the use of a machine made and sold by the patentee may be treated as infringement, we come to the question of the kind of limitation which may be lawfully imposed upon a purchaser.

To begin with, the purchaser must have notice that he buys with only a qualified right of use. He has a right to assume, in the absence of knowledge, that the seller passes an unconditional title to the machine, with no limitations

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upon the use. Where, then, is the line between a lawful and an unlawful qualification upon the use? This is a question of statutory construction. But with what eye [27] shall we read a meaning into it? It is a statute creating and protecting a monopoly. It is a true monopoly, one having its origin in the ultimate authority, the Constitution. Shall we deal with the statute creating and guaranteeing the exclusive right which is granted to the inventor with the narrow scrutiny proper when a statutory right is asserted to uphold a claim which is lacking in those moral elements which appeal to the normal man? Or shall we approach it as a monopoly granted to subserve a broad public policy, by which large ends are to be attained, and, therefore, to be construed so as to give effect to a wise and beneficial purpose? That we must neither transcend the statute, nor cut down its clear meaning, is plain. In *Bement* v. *National Harrow Co.*, 186 U. S. 70, 89, 90, 91 and 92, this court quoted with approval the language of Chief Justice Marshall in *Grant* v. *Raymond*, 6 Pet. 218, 241. Concerning the favorable view which the law takes as to the protection extended to the exclusive right, the court, through Chief Justice Marshall, said:

"It is the reward stipulated for the advantages derived by the public for the exertions of the individual, and is intended as a stimulus to those exertions. The laws which are passed to give effect to this purpose ought, we think, to be construed in the spirit in which they have been made; and to execute the contract fairly on the part of the United States, where the full benefit has been actually received, if this can be done without transcending the intention of the statute, or countenancing acts which are fraudulent or may prove michievous. The public yields nothing which it has not agreed to yield; it receives all which it has contracted to receive. The full benefit of the discovery, after its enjoyment by the discoverer for fourteen years, is preserved, and for his exclusive enjoyment of it during that time the public faith is pledged."

If the patent be for a machine, the monopoly extends to the right of making, selling and using, and these are [28] separable and substantial rights. In *Bloomer* v. *McQuewan*, 14 How. 539, 547, it is said that the grant is of "the right to exclude every one from making, using or vending the thing without the permission of the owner."

In *Bement* v. *National Harrow Co.*, 186 U. S. 70, 90, there was involved the legality of certain contracts between patentees of and dealers in patented harrows. The purpose and effect of the combination and of the contracts between the parties was to fix and keep up the prices at which licensees might sell the patented harrows. It was claimed that the combination and contracts were obnoxious to the Sherman Act; but, upon the other side, it was said that as the contracts concerned only the sale of patented articles that act did not apply. The character of the monopoly granted under the patent act was therefore involved. Touching the right of the patentee to exclude all others from the use of his invention, the court quoted with approval what was said in the *Button Fastener Cases*, 77 Fed. Rep. 288, as follows:

"If he sees fit, he may reserve to himself the exclusive use of his invention or discovery. If he will neither use his device nor permit others to use it, he has but suppressed his own. That the grant is made upon the reasonable expectation that he will either put his invention to practical use or permit others to avail themselves of it upon reasonable terms, is doubtless true. This expectation is based alone upon the supposition that the patentee's interest will induce him to use, or let others use, his invention. The public has retained no other security to enforce such expectations. A suppression can endure but for the life of the patent, and the disclosure he has made will enable all to enjoy the fruit of his genius. His title is exclusive, and so clearly within the constitutional provisions in respect of private property that he is neither bound to use his discovery himself nor permit others to use it."

[29] In the *Paper Bag Patent Case*, 210 U. S. 405, this right to exclude others from all use of the invention was held to be so comprehensive that a patentee was allowed to restrain, by injunction, one who was infringing his patent, although he had, during a long term of years, neither used his invention himself, nor allowed others to use it.

That there are limitations upon the right of vending and using a patented machine may be conceded. Thus, if the thing patented belong to a class of things which on account of their inherent danger to the public safety or health cannot be sold or used because prohibited by an exertion of the police power of a State, they will not be immune to such a

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law because patented. Upon this ground a patent for "an improved burning oil," was held not to take the article without the operation of a state statute forbidding the sale of oil which was unsafe for illuminating purposes. *Patterson* v. *Kentucky*, 97 U. S. 501. And so in the *Bement Case*, the court said of this exclusive grant of privilege (p. 90):

"It is true that in certain circumstances the sale of articles manufactured under letters patent may be prevented when the use of such article may be subject, within the several States, to the control which they may respectively impose in the legitimate exercise of their powers over their purely domestic affairs, whether of internal commerce or of police regulation."

In that case the question was not one of infringement, but one arising in a suit to enforce certain contracts directly restraining commerce in patented articles which were claimed to violate the Sherman law, although the agreements covered only patented articles. The court, after referring to the exceptions to the patentee's monopoly resulting from conflict with the police power of the State, said (p. 91):

"Notwithstanding these exceptions, the general rule is absolute freedom in the use or sale of rights under the [30] patent laws of the United States. The very object of these laws is monopoly, and the rule is, with few exceptions, that any conditions which are not in their very nature illegal with regard to this kind of property, imposed by the patentee and agreed to by the licensee for the right to manufacture or use or sell the article, will be upheld by the courts. The fact that the conditions in the contracts keep up the monopoly or fix prices does not render them illegal."

Now, if this was a suit to recover damages upon the contract not to use the machine except in connection with other articles proper in its use made by the patentee, the only possible defense would be that the agreement was one contrary to public policy in that it affected freedom in the sale of such articles to the user of such machines. But that was the nature of the defense made to the suit to enforce the agreements under consideration in the *Bement Case*. The court in that case found that the contracts did include interstate commerce within their provisions and restrained interstate trade, but with reference to the Sherman Act said (p. 92):

"But that statute clearly does not refer to that kind of a restraint of interstate commerce which may arise from reasonable and legal conditions imposed upon the assignee or licensee of a patent by the owner thereof, restricting the terms upon which the article may be used and the price to be demanded therefor. Such a construction of the act we have no doubt was never contemplated by its framers."

As to whether the restrictions upon sales imposed by the agreements were "legal and reasonable conditions," the court said (p. 93):

"The provision in regard to the price at which the licensee would sell the article manufactured under the license was also an appropriate and reasonable condition. It tended to keep up the price of the implements manu[31]factured and sold, but that was only recognizing the nature of the property dealt in, and providing for its value so far as possible. This the parties were legally entitled to do. The owner of a patented article can, of course, charge such price as he may choose, and the owner of a patent may assign it or sell the right to manufacture and sell the article patented upon the condition that the assignee shall charge a certain amount for such article."

If the stipulation in an agreement between patentees and dealers in patented articles, which, among other things, fixed a price below which the patented articles should not be sold, would be a reasonable and valid condition, it must follow that any other reasonable stipulation, not inherently violative of some substantive law, imposed by a patentee as part of a sale of a patented machine, would be equally valid and enforceable. It must also follow, that if the stipulation be one which qualifies the right of use in a machine sold subject thereto, so that a breach would give rise to a right of action upon the contract, it would be at the same time an act of infringement, giving to the patentee his choice of remedies.

But it has been very earnestly said that a condition restricting the buyer to use it only in connection with ink made by the patentee is one of a character which gives to a patentee the power to extend his monopoly so as to cause it to embrace any subject, not within the patent, which he chooses to require that the invention shall be used in connection with. Of course the argument does not mean that the effect of such a condition is to cause things to become patented which were not so without the requirement. The

stencil, the paper and the ink made by the patentee will continue to be unpatented. Anyone will be as free to make, sell and use like articles as they would be without this restriction, save in one particular—namely, they may not be sold to a user of one of the patentee's machines with intent that they [32] shall be used in violation of the license. To that extent competition in the sale of such articles, for use with the machine, will be affected; for sale to such users for infringing purposes will constitute contributory infringement. But the same consequence results from the sale of any article to one who proposes to associate it with other articles to infringe a patent, when such purpose is known to the seller. But could it be said that the doctrine of contributory infringement operates to extend the monopoly of the patent over subjects not within it because one subjects himself to the penalties of the law when he sells unpatented things for an infringing use? If a patentee says, "I may suppress my patent if I will. I may make and have made devices under my patent, but I will neither sell nor permit anyone to use the patented things," he is within his right, and none can complain. But if he says, "I will sell with the right to use only with other things proper for using with the machines, and I will sell at the actual cost of the machines to me, provided you will agree to use only such articles as are made by me in connection therewith," if he chooses to take his profit in this way, instead of taking it by a higher price for the machines, has he exceeded his exclusive right to make, sell and use his patented machines? The market for the sale of such articles to the users of his machine, which, by such a condition, he takes to himself, was a market which he alone created by the making and selling of a new invention. Had he kept his invention to himself, no ink could have been sold by others for use upon machines embodying that invention. By selling it subject to the restriction he took nothing from others and in no wise restricted their legitimate market.

A like objection has been made against injunctions restraining the sale for infringing purposes of a single element in a patent combination. It was said that to enjoin such sales, although the thing sold was intended [33] to be used

with other elements to complete an infringing combination, was to extend the scope of the patent so as to give to the patentee the same advantage as if the element had been claimed alone. But in *Davis Electrical Co.* v. *Edison Co.*, 60 Fed. Rep. 276, 280, Judge Putnam answered this, saying:

"Neither in such instances, nor in the case at bar, is the course of the law to be turned aside because the practical result may be to give a patentee for the time being more than the patent office contemplated, nor is the patentee to be deprived of his just rights because under some circumstances he gets incidental advantages beyond what he expressly bargained for. We do not in terms give the patentee the benefit of a claim for the filament alone, nor prohibit its use in some other combination than that set out in the second claim, if some ingenious way of making such other combination is ever discovered."

In *Thomson-Houston Co.* v. *Kelsey Co.*, 72 Fed. Rep. 1016, the language was adopted by Judge Townsend.

Neither can we see that the liability of the defendants for aiding and abetting an infringing use by Miss Skou would be different whether she had made her machine in open defiance of the rights of the patentee or had bought it under conditions limiting her right of use. If she had made it, she would have been liable to an action for infringement for making; and if she used it, she would become liable for such infringing use. But if the defendants knew of the patent and that she had unlawfully made the patented article, and then sold her ink or other supplies without which she could not operate the machine, *with the intent and purpose that she should use the infringing article by means of the ink supplied by them*, they would assist in her infringing use.

"Contributory infringement," says Judge Townsend in *Thomson-Houston Co.* v. *Kelsey Co.*, 72 Fed. Rep. 1016, [34] 1017, "has been well defined as the intentional aiding of one person by another in the unlawful making or selling or using of the patented invention." To the same effect are *Wallace* v. *Holmes*, 29 Fed. Cases, 74, 79; *Risdon Iron & Locomotive Works* v. *Trent*, 92 Fed. Rep. 375; *Thomson-Houston Co.* v. *Ohio Brass Works*, 80 Fed. Rep. 712; *American Graphophone Co.* v. *Hawthorne*, 92 Fed. Rep. 516.

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In the *Risdon Case*, a member of the firm which made the plans for the construction of certain mining machinery to be made in the owner's shop, and then superintended its erection at the mine, was held to be guilty of infringement, though he neither personally made nor used the machines which were found to be an infringement of valid patents. In *American Graphophone Co.* v. *Hawthorne*, one who sold a machine with knowledge that it was to be used to produce an infringing article was held to be liable as an infringer.

For the purpose of testing the consequence of a ruling which will support the lawfulness of a sale of a patented machine for use only in connection with supplies necessary for its operation bought from the patentee, many fanciful suggestions of conditions which might be imposed by a patentee have been pressed upon us. Thus it is said that a patentee of a coffee pot might sell on condition that it be used only with coffee bought from him, or, if the article be a circular saw, that it might be sold on condition that it be used only in sawing logs procured from him. These and other illustrations are used to indicate that this method of marketing a patented article may be carried to such an extent as to inconvenience the public and involve innocent people in unwitting infringements. But these illustrations all fail of their purpose, because the public is always free to take or refuse the patented article on the terms imposed. If they be too onerous or not in keeping with the benefits, the patented article will not find a market. The public, by permitting the invention to go unused, loses nothing [35] which it had before, and when the patent expires will be free to use the invention without compensation or restriction. This was pointed out in the *Paper Bag Case*, where the inventor would neither use himself nor allow others to use, and yet was held entitled to restrain infringement, because he had the exclusive right to keep all others from using during the life of the patent. This larger right embraces the lesser of permitting others to use upon such terms as the patentee chooses to prescribe. It must not be forgotten that we are dealing with a constitutional and

statutory monopoly. An attack upon the rights under a patent because it secures a monopoly to make, to sell and to use, is an attack upon the whole patent system. We are not at liberty to say that the Constitution has unwisely provided for granting a monopolistic right to inventors, or that Congress has unwisely failed to impose limitations upon the inventor's exclusive right of use. And if it be that the ingenuity of patentees in devising ways in which to reap the benefit of their discoveries requires to be restrained, Congress alone has the power to determine what restraints shall be imposed. As the law now stands it contains none, and the duty which rests upon this and upon every other court is to expound the law as it is written. Arguments based upon suggestions of public policy not recognized in the patent laws are not relevant. The field to which we are invited by such arguments is legislative, not judicial. The decisions of this court, as we have construed them, do not so limit the privilege of the patentee, and we could not so restrict a patent grant without overruling the long line of judicial decisions from Circuit Courts and Circuit Courts of Appeal, heretofore cited, thus inflicting disastrous results upon individuals who have made large investments in reliance upon them.

The conclusion we reach is that there is no difference, in principle, between a sale subject to specific restrictions as to the time, place or purpose of use and restrictions [36] requiring a use only with other things necessary to the use of the patented article purchased from the patentee. If the violation of the one kind is an infringement, the other is also. That a violation of any such restriction annexed to a sale by one with notice constitutes an infringing use has been decided by a great majority of the Circuit Courts and Circuit Courts of Appeal, and has come to be a well-recognized principle in the patent law, in accordance with which vast transactions in respect to patented articles have been conducted. But it is now said that the numerous decisions by the lower courts have been erroneous in respect to the proper construction of the limit of the monopoly conferred by a patent, and that they should now be overruled. To these

courts has been committed the duty of interpreting and administering the patent law. There is no power in this court to review their judgments, except upon a writ of certiorari, or to direct their decisions, save through a certified interrogatory for direction upon a question of law. This power to review by certiorari is one which has been seldom exercised in patent cases. A line of decisions, which has come to be something like a rule of property, under which large businesses have been conducted, should at least not be overruled except upon reasons so clear as to make any other construction of the patent law inadmissible.

The earliest of the reported cases in which the precise question here presented arose were cases arising in suits for the infringement of a patent upon an iron band connected by a buckle, intended for binding cotton bales. The band and this buckle were of iron. The buckle was so adjusted as that the band could be removed from the bale only by cutting. Upon the buckle were stamped the words: "Licensed to use only once." When cut from the bale the band and buckle were sold to persons, who used the buckles either upon a new band, or one repaired, and these bands were sold to planters to be used again in baling [37] cotton. The question arose in a number of cases as to whether such second use of the buckles by one with notice, was an infringing use. In *American Cotton Tie Co.* v. *Simmons*, 3 Ban. & A. 320, Judge Shepley dismissed the bill. The case, upon appeal to this court, was reversed, upon the ground that that which had been done after the first use was a reconstruction, and not a repair, and was, therefore, an infringement. 106 U. S. 89. The court did not pass upon the question whether a second use of the buckles would be an infringing use. Another case arising under the same patent was that of *American Cotton Tie Supply Co.* v. *Bullard*, 4 Ban. & A. 520, decided by Judge Blatchford, who gave the question great consideration. "It is manifest," says Judge Blatchford, "that the owner of the patents intended, by the stamps upon the buckles and the imprints on the billheads, to grant a restricted license for the use of the ties and the buckles, and that the intended restriction was to a use of them once only,

as baling ties. The words, 'licensed to use once only,' stamped on each buckle, were a notice to everyone who handled it that there was attached to it a restriction in the shape of a license, and of a license merely to use, and of a license to use only once. This was a lawful restriction."

Concerning the question of the effect of this restriction upon subsequent buyers of the cotton with its bands and buckles, the court said:

It is difficult to see how, in view of the facts of the case, the owners of these patents can properly be said to have sold the buckles for the purpose of allowing them to be used in the ordinary pursuits of life and to pass into the markets of the country as an ordinary article of commerce. * * * The original license is fairly a license to have the buckle and the band confine a bale until the consumer needs to confine the bale no longer, and a license for no longer time. There is no purchase of buckle and band by a purchaser of the baled cotton, except as he purchases them confining the cotton [88] and to confine it until it reaches the consumer, and such purchase of buckle and band is, in effect, only a purchase of them subject to such original license. It is quite as reasonable to say that the purchaser of the cotton buys subject to such license as it is to say that the licensor, having imposed the restricted license, permits it to be instantly destroyed. The former view is consistent with the original intention, and the latter view is inconsistent with it.

As indicating the trend of judicial opinion that such license restrictions annexed to patented articles, when sold, constitute licenses under the patent, and that their violation by persons having notice constitutes an infringement of the patent, we here set out in the margin a number of the reported cases.[1]

It would lengthen this opinion unreasonably to make

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[1] *Dickerson* v. *Matheson*, 57 Fed. Rep. 524, Second Circuit Court of Appeals; *Heaton-Penin. Co.* v. *Eureka Specialty Co.*, 77 Fed. Rep. 288, Sixth Circuit Court of Appeals; *Tubular Rivet Co.* v. *O'Brien*, 93 Fed. Rep. 200; *Cortelyou* v. *Lowe*, 111 Fed Rep. 1005, Second Circuit Court of Appeals; *Edison Phonograph Co.* v. *Kaufmann*, 105 Fed. Rep. 960; *Edison Phonograph Co.* v. *Pike*, 116 Fed. Rep. 863; *Victor Talking Machine Co.* v. *The Fair*, 123 Fed. Rep. 424, Seventh Circuit Court of Appeals; *National Phonograph Co.* v. *Schlegel*, 128 Fed. Rep. 733; *The Fair* v. *Dover Mfg. Co.*, 166 Fed. Rep. 117; *Æolian Co.* v. *Juelg Co.*, 155 Fed. Rep. 119, Second Circuit Court of Appeals; *A. B. Dick Co.* v. *Milwaukee Co.*, 168 Fed. Rep. 930, Seventh Circuit Court of Appeals; *Crown Cork & Seal Co.* v. *Brooklyn Co.*, 172 Fed. Rep. 225; *Rupp* v.

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[39] quotations from these opinions to show either the grounds upon which they go or their applicability. Some of them concern sales subject to a restriction upon the price upon resale, and others relate to a requirement that the article sold shall be used only in connection with certain other things to be bought from the patentee. We deem it well, however, to refer to the opinion of the Circuit Court of Appeals of the Eighth Circuit, delivered by Judge (now Mr. Justice) Van Devanter in *National Phonograph Co.* v. *Schlegel*, cited above, because it draws so clearly the distinction between a conditional and an unconditional sale of a patented article. Speaking for the court, Judge Van Devanter said (128 Fed. Rep. 733, 735):

> An unconditional or unrestricted sale by the patentee, or by a licensee authorized to make such sale, of an article embodying the patented invention or discovery, passes the article without the limits of the monopoly, and authorizes the buyer to use or sell it without restriction; but to the extent that the sale is subject to any restriction upon the use or future sale the article has not been released from the monopoly, but is within its limits, and, as against all who have notice of the restriction, is subject to the control of whoever retains the monopoly. This results from the fact that the monopoly is a substantial property right conferred by law as an inducement or stimulus to useful invention and discovery, and that it rests with the owner to say what part of this property he will reserve to himself and what part he will transfer to others, and upon what terms he will make the transfer.

There is no collision between the rule against restrictions upon the alienation or use of chattels not made under the protection of a patent and the right of the patentee through his control over his invention. The distinction is pointed out

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Elliott, 131 Fed. Rep. 730, Sixth Circuit Court of Appeals; *Commercial Co.* v. *Autolux Co.*, 181 Fed. Rep. 387; *Boesch* v. *Graff*, 133 U. S. 697, where articles made in Germany under a German patent, and imported to this country, were held to infringe a United States patent for the same article; and *Dickerson* v. *Tinling*, 84 Fed. Rep. 192, where it was held that one purchasing a patented article in Germany from the owners of a United States patent, having marked on it a condition that it should not be imported into the United States, was held guilty of infringement by bringing it into the United States.

See also Curtiss on Patents, §§ 218–218a; Walker on Patents, §§ 300, 301, 302; *Wilson* v. *Sherman*, 1 Blatchf. 536.

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by Mr. Justice Hughes in *Dr. Miles Medical Co.* v. *Park & Sons Co.*, 220 U. S. 373, 401.

The English patent law, like our own, grants to the [40] patentee the exclusive right to make, to sell and to use. The decisions of the English courts upon the subject are, therefore, worthy of examination, and weight should be attached not only because of the respect due by reason of the similarity of statutes, but because many English patentees take out American patents and the converse. The English opinions which we shall refer to have to do with the sale of patented articles with restrictions upon the use.

The cases of *Incandescent Gaslight Co.* v. *Cantelo*, 12 Patent Law Reports, 262, decided in 1895, and *Incandescent Gaslight Co.* v. *Brogden*, 16 Patent Law Reports, 179, decided in 1899, were actions for the infringement of the Welsbach mantle patent for incandescent gas lighting. The mantles were sold subject to a license restriction, printed on the box containing them, that they should be used in connection with burners or apparatus sold or supplied by the patentee. In the *Cantelo Case* Mr. Justice Wills said (p. 264):

> The sale of a patented article carries with it the right to use it in any way that the purchaser chooses to use it, unless he knows of restrictions. Of course, if he knows of restrictions, and they are brought to his mind at the time of the sale, he is bound by them. He is bound by them on this principle: The Patentee has the sole right of using and selling the articles, and he may prevent anybody from dealing with them at all. Inasmuch as he has the right to prevent people from using them, or dealing in them at all, he has the right to do the lesser thing, that is to say, to impose his own conditions. It does not matter how unreasonable or how absurd the conditions are. It does not matter what they are if he says at the time when the purchaser proposes to buy, or the person to take a license, "Mind, I only give you this license on this condition," and the purchaser is free to take it or leave it as he likes. If he takes it, he must be bound by the condition. It seems [41] to be common sense, and not to depend upon any patent law, or any other particular law.

Upon the evidence it was held that Cantelo not having bought direct, he did not have actual knowledge of the restriction, and he was given judgment for costs upon that defense.

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In the subsequent case against Brogden, the complainants were given in injunction against future infringement, and an accounting for damages for past infringement, upon the second point in the claim, namely, that the defendant had sold, being a dealer, with notice of the restriction, for use upon a burner not made or supplied by the patentee. As to the effect of the sale subject to the license restriction as to the use, Lord Justice Kennedy said:

A patentee has a right, not merely by sale without reserve, to give an unlimited right to the purchaser to use, and thereby to make a grant from which he cannot derogate, but may attach to it conditions, and if these conditions are broken then there is no license, because the licensee is bound up with the observance of the conditions.

In *British Mutoscope and Biograph Company* v. *Homer*, 17 Times Law Reports, 213, decided in 1901, it was held that the purchaser of a mutoscope under a rent distress warrant obtained no greater right to the use of the patented machine than that which pertained to the execution debtor, and that if the debtor had no right other than a strictly personal right to use, the purchaser obtained no right to the use. Mr. Justice Farwell, who delivered the opinion, cited and quoted with approval from the case of the *Incandescent Gaslight Co.* v. *Brogden*, 16 Patent Law Reports, 179, where it was said that a purchaser who buys with knowledge of the conditions under which his vendor is authorized to use a patented invention is bound by such conditions, and that such conditions are not contractual, but are incident to and a [42] limitation of the grant of the licensee to use, so that if the conditions are broken there is no grant at all.

In *McGruther* v. *Pitcher*, 20 Times Law Reports, 652, it is held that the purchaser of an article made under a patent and sold originally subject to restrictions as to place or method of use is not bound by such restrictions unless he buys with notice of them, as such restrictions do not run with the goods and are obligatory only upon those persons who take the article with knowledge of the conditions.

In the very late case of the *National Phonograph Co.* v. *Menck*, decided in 1911 by the Judicial Committee of the Privy Council, and reported in 27 Times Law Reports, 239,

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the cases were cited and reviewed. Referring to the distinction between the principles applicable to sales of unpatented and patented articles, Lord Shaw, in delivering the opinion of the court said (p. 241):

To begin with, the general principle * * * applicable to ordinary goods bought and sold, is not here in question. The owner may use and dispose of these as he sees fit. He may have made a certain contract with the person from whom he bought, and to such a contract he must answer. Simply, however, in his capacity as owner, he is not bound by any restrictions in regard to the use or sale of the goods, and it is out of the question to suggest that restrictive conditions run with the goods. * * *

Referring to former cases, he proceeds:

All that is affirmed is that the general doctrine of absolute freedom of disposal of chattels of an ordinary kind is, in the case of patented chattels, subject to the restriction that the person purchasing them, and in the knowledge of the conditions attached by the patentee, which knowledge is clearly brought home to himself at the time of sale, shall be bound by that knowledge and accept the situation of ownership subject to the limitations. These limitations are merely the respect paid and the effect given to those conditions of transfer of the [48] patented article which the law, laid down by statute, gave the original patentee a power to impose. Whether the law on this head should be changed and the power of sale *sub modo* should be withdrawn or limited is not a question for a court. It may be added that where a patented article has been acquired by sale, much, if not all, may be implied as to the consent of the licensee to an undisturbed and unrestricted use thereof. In short, such a sale negatives in the ordinary case the imposition of conditions and the bringing home to the knowledge of the owner of the patented goods that restrictions are laid upon him.

Lord Shaw then referred to the case of the *Incandescent Light Co.* v. *Cantelo*, cited above, saying that,

The judgment in that case by Mr. Justice Wills forms undoubtedly a leading authority in the law of England.

The passage above set out is then quoted in full.

The precise question here involved has never been decided by this court. It was raised in the *Cotton Tie Case*, 106 U. S. 89, but was passed by and the case decided upon the single ground that the defendants had infringed by a reconstruction of the bands after they had been cut. It was again presented in *Cortelyou* v. *Johnson*, 207 U. S. 196, 199,

but was not decided, because it did not appear that the defendants, charged as contributory infringers as in the present case, had notice of the restriction upon the use of the patented machine.

In *Bobbs-Merrill Co.* v. *Straus*, 210 U. S. 339, 345, it was urged that the analogy between the right of one under the copyright statute to fix the price at which a copyrighted book might be sold by retailers by a mere notice accompanying the book, and the right of one selling a patented article subject to a condition that it should not be sold at less than a prescribed minimum price, was such as to entitle the owner of the copyright to treat a sale contrary to the notice as an infringing sale. But this court declined to consider the rule applicable to restrictive [44] licenses accompanying the sale of a patented article, saying:

If we were to follow the course taken in the argument, and discuss the rights of a patentee, under letters patent, and then, by analogy, apply the conclusions of copyrights, we might greatly embarrass the consideration of a case under letters patent, when one of that character shall be presented to this court.

We may say in passing, disclaiming any intention to indicate our views as to what would be the rights of parties in circumstances similar to the present case under the patent laws, that there are differences between the patent and copyright statutes in the extent of the protection granted by them. This was recognized by Judge Lurton, who wrote a leading case on the subject in the Federal courts (*The Button Fastener Case*, 77 Fed. Rep. 288), for he said in the subsequent case of *Park & Sons* v. *Hartman*, 153 Fed. Rep. 24:

"There are such wide differences between the right of multiplying and vending copies of a production protected by the copyright statute and the rights secured to an inventor under the patent statutes, that the cases which relate to the one subject are not altogether controlling as to the other."

Touching the question there involved, the court said (p. 350):

The precise question, therefore, in this case is, does the sole right to vend (named in §4952) secure to the owner of the copyright the right, after the sale of the book to a purchaser, to restrict future sales of the book at retail, to the right to sell it at a certain price per copy, because of a notice in the book that a sale at a different price will be treated as an infringement, which notice has been brought home to one undertaking to sell for less than the named sum? We do not think the statute can be given such a construction,

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and it is to be remembered that this is purely a question of statutory construction. There is [45] no claim in this case of contract limitation, nor license agreement controlling the subsequent sales of the book.

In our view the copyright statutes, while protecting the owner of the copyright in his right to multiply and sell his production, do not create the right to impose, by notice, such as is disclosed in this case, a limitation at which the book shall be sold at retail by future purchasers, with whom there is no privity of contract. This conclusion is reached in view of the language of the statute, read in the light of its main purpose to secure the right of multiplying copies of the work, a right which is the special creation of the statute. True, the statute also secures, to make this right of multiplication effectual, the sole right to vend copies of the book, the production of the author's thought and conception. The owner of the copyright in this case did sell copies of the book in quantities and at a price satisfactory to it. It has exercised the right to vend. What the complainant contends for embraces not only the right to sell the copies, but to qualify the title of a future purchaser by the reservation of the right to have the remedies of the statute against an infringer because of the printed notice of its purpose so to do unless the purchaser sells at a price fixed in the notice. To add to the right of exclusive sale the authority to control all future retail sales, by a notice that such sales must be made at a fixed sum, would give a right not included in the terms of the statute, and, in our view, extend its operation, by construction, beyond its meaning, when interpreted with a view to ascertaining the legislative intent in its enactment.

Though the Constitution gives to Congress power to promote "Science and Useful Arts," by securing for a limited time to writers and inventors "the exclusive right to their respective writings and discoveries," the legislation for this purpose had to be adapted to the difference between a "discovery" and a "writing." To secure to [46] the author an exclusive right to his "writings" Congress provided that he should have "the sole liberty of printing, reprinting, publishing, completing, copying, executing, finishing and vending the same." Revised Statutes, §4952. This is, in short, the sole right to multiply and vend copies of his production. While there are resemblances between the right of the author to "vend" his copyrighted production, and of the patentee to "vend" the patented thing, the inherent difference between the production of an author, be it a book, music or a picture, and that of an inventor, be it a machine, a process

or an article, is so manifest that the exclusive right of one to multiply and sell was declared sufficient to give him that exclusive right to his writings proposed by the Constitution. To the inventor, by § 4884, Revised Statutes, there is granted "the exclusive right to make, *use* and vend the invention or discovery." This grant, as defined in *Bloomer* v. *McQuewan*, 14 How. 539, 549, "consists altogether in the right to exclude every one from making, *using* or vending the thing patented." Thus, there are several substantive rights, and each is the subject of sub-division, so that one person may be permitted to make, but neither to sell nor use the patented thing. To another may be conveyed the right to sell, but within a limited area, or for a particular use, while to another the patentee may grant only the right to make and use, or to use only for specific purposes. *Adams* v. *Burks*, 17 Wall. 453; *Mitchell* v. *Hawley*, 16 Wall. 544; *Rubber Co.* v. *Goodyear*, 9 Wall. 788, 799. Thus, in the case last cited the license was "to use the said Goodyear's gum-elastic composition for coating cloth for the purpose of japanning, marbling, and variegate japanning, at his own establishment, but not to be disposed of to others for that purpose without the consent of the said Charles Goodyear, * * * the right and license hereby conferred being limited to the United States, and not extending to any foreign country, and not being [47] intended to convey any right to make any contract with the government of the United States." Of this license, this court said (p. 799):

> It authorizes Chaffee to use it himself. It gave him no right to authorize others to use it in conjunction with himself, or otherwise, without the consent of Goodyear, which is not shown, and not to be presumed. It was to be used at his own establishment, and not at one occupied by himself and others. Looking at the terms of the instrument, and the testimony in the record, we are satisfied that its true meaning and purpose were to authorize the licensee to make and sell India-rubber cloth, to be used in the place, and for the purposes, of patent or japanned leather. In our judgment it conveyed authority to this extent and nothing more.

The licensees were held to have infringed the license by uses not permitted.

We have already pointed out that in the *Bement Case*, 186 U. S. 91, it was said in respect of the power of a pat-

entee that, in the sale of rights under a patent, "with few exceptions any conditions which are not in their nature illegal with regard to this kind of property, imposed by the patentee and agreed to by the licensee, for the right to manufacture, *or use, or sell the article* will be upheld by the courts." (Italics ours.) The question, as was said in reference to the copyright, is one of statutory construction. The kinds of property rights sought to be guaranteed and the terms of the two statutes are so different that very different constructions have been placed upon them. There is no collision whatever between the decision in the *Bobbs-Merrill Case* and the present opinion. Each rests upon a construction of the applicable statute, and the special facts of the cases.

The *Paper Roll Case* (*Morgan Envelope Co.* v. *Albany Paper Co.*), 152 U. S. 425, has been relied upon by the defendants. We do not question that case, nor anything it [48] decides. But it has no application to the question here presented. This is manifest when that case is attentively examined. First, because here the ink and other supplies used in the operation of the complainant's rotary mimeograph patent were not made elements of the patent, as in the *Paper Roll Case;* and second, the toilet paper fixture in the *Paper Roll Case* was not sold with the license restriction that it was not to be used except in connection with paper supplied by the patentee. There was some evidence of a practice to sell the fixture only to those who used the patentee's paper; but this was far from proof of a specific license annexed to the sale of the fixtures that they were sold only to be used with paper supplied by the patentee. One who bought subject to no such restriction acquired the right to use the fixture with any paper. The opinion in that case is considered and analyzed in all of its aspects in the *Button Fastener Case*, 77 Fed. Rep. 288, 298-9.

We come then to the question as to whether "the acts of the defendants constitute contributory infringement of the complainants' patent."

The facts upon which our answer must be made are somewhat meagre. It has been urged that we should make a

negative reply to the interrogatory as certified, because the intent to have the ink sold to the licensee used in an infringing way is not sufficiently made out. Undoubtedly a bare supposition that by a sale of an article which though adapted to an infringing use is also adapted to other and lawful uses, is not enough to make the seller a contributory infringer. Such a rule would block the wheels of commerce. There must be an intent and purpose that the article sold will be so used. Such a presumption arises when the article so sold is only adapted to an infringing use. *Rupp & Wittgenfeld Co.* v. *Elliott*. 131 Fed. Rep. 730. It may also be inferred where its most conspicuous use is one which will coöperate in an infringement when sale to such user is invoked by advertise[49]ment. *Kalem Co.* v. *Harper Brothers*, decided at this term, 222 U. S. 55.

These defendants are, in the facts certified, stated to have made a direct sale to the user of the patented article, with knowledge that under the license from the patentee she could not use the ink, sold by them directly to her, in connection with the licensed machine, without infringement of the monopoly of the patent. It is not open to them to say that it might be used in a non-infringing way, for the certified fact is that they made the sale, "with the expectation that it would be used in connection with said mimeograph." The fair interpretation of the facts stated is that the sale was with the purpose and intent that it would be so used.

So understanding the import of the question in connection with the facts certified, *we must answer the question certified affirmatively*.

MR. JUSTICE DAY did not hear the argument and took no part in the decision of this case.

MR. CHIEF JUSTICE WHITE, with whom concurred MR. JUSTICE HUGHES and MR. JUSTICE LAMAR, dissenting.

My reluctance to dissent is overcome in this case: First, because the ruling now made has a much wider scope than the mere interest of the parties to this record, since, in my opinion, the effect of that ruling is to destroy, in a very

large measure, the judicial authority of the States by unwarrantedly extending the Federal judicial power. Second, because the result just stated, by the inevitable development of the principle announced, may not be confined to sporadic or isolated cases, but will be as broad as society itself, affecting a multitude of people and capable of operation upon every conceivable subject of human contact, interest or activity, however [50] intensely local and exclusively within state authority they otherwise might be. Third, because the gravity of the consequences which would ordinarily arise from such a result is greatly aggravated by the ruling now made, since that ruling not only vastly extends the Federal judicial power, as above stated, but as to all the innumerable subjects to which the ruling may be made to apply, makes it the duty of the courts of the United States to test the rights and obligations of the parties, not by the general law of the land, in accord with the conformity act, but by the provisions of the patent law, even although the subjects considered may not be within the embrace of that law, thus disregarding the state law, overthrowing, it may be, the settled public policy of the State, and injuriously affecting a multitude of persons. Lastly, I am led to express the reasons which constrain me to dissent, because of the hope that if my forebodings as to the evil consequences to result from the application of the construction now given to the patent statute be well founded, the statement of my reasons may serve a twofold purpose: First, to suggest that the application in future cases of the construction now given be confined within the narrowest limits, and, second, to serve to make it clear that if evils arise their continuance will not be caused by the interpretation now given to the statute, but will result from the inaction of the legislative department in failing to amend the statute so as to avoid such evils.

Let me briefly recapitulate the facts and the rulings based thereon. A machine styled a rotary mimeograph was covered by a patent. The claims of the patent, however, did not embrace the ink or other materials used in working the machine, nor were they covered by independent patents. The Dick Company, owner of the patent, sold one of the ma-

chines to a Miss Skou. The entire title was parted with; in other words, there [51] was no condition imposed affecting the title or the uses to which the machine might be applied or the duration of the use. Upon the machine, however, was inscribed a notice, styled a License Restriction, reciting that the machine "may be used only with the stencil paper, ink and other supplies made by the A. B. Dick Company, Chicago, U. S. A." The Henry Company, dealers in ink, sold to Miss Skou, for use in working her machine, ink not made by the Dick Company. The court now decides that a use of such ink by Miss Skou would have been "a use of the machine in a prohibited way," and would have rendered her "liable to an action under the patent law for infringement," and that the seller of the ink was liable as an infringer of the patent on the machine because of the aiding and abetting of a proposed infringing use.

I cannot bring my mind to assent to the conclusion referred to, and shall state in the light of reason and authority why I cannot do so. As I have said, the ink was not covered by the patent; indeed, it is stated in argument and not denied that a prior patent which covered the ink had expired before the sale in question. It, therefore, results that a claim for the ink could not have been lawfully embraced in the patent, and if it had been by inadvertence allowed such claim would not have been enforcible. This curious anomaly then results, that that which was not embraced by the patent, which could not have been embraced therein and which if mistakenly allowed and included in an express claim would have been inefficacious, is now by the effect of a contract held to be embraced by the patent and covered by the patent law. This inevitably causes the contentions now upheld to come to this, that a patentee in selling the machine covered by his patent has power by contract to extend the patent so as to cause it to embrace things which it does not include; in other words, to exercise legislative power [52] of a far-reaching and dangerous character. Looking at it from another point of view and testing the contention by a consideration of the rights protected by the patent law and the rights which an inventor who obtains a patent takes under that law, the

proposition reduces itself to the same conclusion. The natural right of any one to make, vend and use his invention which but for the patent law might be invaded by others, is by that law made exclusive, and hence the power is conferred to exclude others from making, using or vending the patented invention. *Paper Bag Patent Case*, 210 U. S. 405, 424–425, and cases cited.

The exclusive right of use of the invention embodied in the machine which the patent protected was a right to use it anywhere and everywhere for all and every purpose of which the machine as embraced by the patent was susceptible. The patent was solely upon the mechanism which when operated was capable of producing certain results. A patent for this mechanism was not concerned in any way with the materials to be used in operating the machine, and certainly the right protected by the patent was not a right to use the mechanism with any particular ink or other operative materials. Of course as the owner of the machine possessed the ordinary right of an owner of property to use such materials as he pleased in operating his patented machine and had the power in selling his machine to impose such conditions in the nature of covenants not contrary to public policy as he saw fit, I shall assume that he had the power to exact that the purchaser should use only a particular character of materials. But as the right to employ any desired operative materials in using the patented machine was not a right derived from or protected by the patent law, but was a mere right arising from the ownership of property, it cannot be said that the restriction concerning the use of the materials was a restriction upon the use of the machine protected [53] by the patent law. When I say it cannot be said I mean that it cannot be so done in reason, since the inevitable result of so doing would be to declare that the patent protected a use which it did not embrace. And this after all serves to demonstrate that it is a misconception to qualify the restriction as one on the use of the machine, when in truth both in form and substance it was but a restriction upon the use of materials capable of being em- in operating the machine. In other words, every use

which the patent protected was transferred to Miss Skou, and the very existence of the particular restriction under consideration presupposes such right of complete enjoyment, and because of its possession there was engrafted a contract restriction, not upon the use of the machine, but upon the materials. And these considerations are equally applicable to the exercise of the exclusive right to vend protected by the patent unless it can be said that by the act of selling a patented machine and disposing of all the use of which it is capable a patentee is endowed with the power to amplify his patent by causing it to cover in the future things which at the time of the sale it did not embrace.

But the result of this analysis serves at once again to establish, from another point of view, that the ruling now made in effect is that the patentee has the power, by contract, to extend his patent rights so as to bring within the claims of his patent things which are not embraced therein, thus virtually legislating by causing the patent laws to cover subjects to which without the exercise of the right of contract they could not reach, the result being not only to multiply monopolies at the will of an interested party, but also to destroy the jurisdiction of the state courts over subjects which from the beginning have been within their authority.

The vast extent to which the results just stated may be carried will be at once apparent by considering the facts [54] of this case and hearing in mind that this is not the suit of a patentee against one with whom he has contracted to enforce as against such person an act done in violation of a contract as an infringement, but it is against a third person who happened to deal in an ordinary commodity of general use with a person with whom the patentee had contracted. And this statement shows that the effect of the ruling is to make the virtual legislative authority of the owner of a patented machine extend to every human being in society without reference to their privity to any contract existing between the patentee and the one to whom he has sold the patented machine. It is worthy of observation that the vast power which the ruling confers upon the holders

of patented inventions does not alone cause controversies which otherwise would be subject to the state jurisdiction to become matters of exclusive Federal cognizance, but subjects the rights of the parties when in the Federal forum to the patent law to the exclusion of the state law which otherwise would apply and it may be to the overthrow of the settled public policy of the State wherein the dealings involved take place. All these results are in a measure comprehensively portrayed by the decree of the Circuit Court. They are, moreover, vividly shown by a reference made by the court to and the putting aside as inapplicable of a previous decision of this court (*Dr. Miles Medical Co.* v. *Park & Sons Co.*, 220 U. S. 373), which if here applied would cause the alleged license to be held void as against public policy. As the theory upon which the *Miles Medical Co. Case* is treated as inapplicable is that this case is one governed by the patent laws and therefore not within the rule of public policy which the *Miles Case* applied, it is made indubitably clear that the ruling now announced endows the patentee with a right by contract not only to produce the fundamental change as to jurisdiction of the state and Federal courts to which I have referred, but also to bring about the over- [55] throw of the public policy both of the State and Nation, which I at the outset indicated was a consequence of the ruling now made.

I do not think it necessary to stop to point out the innumerable subjects which will be susceptible of being removed from the operation of state judicial power and the fundamental and radical character of the change which must come as a result of the principle decided. But nevertheless let me give a few illustrations:

Take a patentee selling a patented engine. He will now have the right by contract to bring under the patent laws all contracts for coal or electrical energy used to afford power to work the machine or even the lubricants employed in its operation. Take a patented carpenter's plane. The power now exists in the patentee by contract to validly confine a carpenter purchasing one of the planes to the use of lumber sawed from trees grown on the land of a par-

ticular person or sawed by a particular mill. Take a patented cooking utensil. The power is now recognized in the patentee to bind by contract one who buys the utensil to use in connection with it no other food supply but that sold or made by the patentee. Take the invention of a patented window frame. It is now the law that the seller of the frame may stipulate that no other material shall be used in a house in which the window frames are placed except such as may be bought from the patentee and seller of the frame. Take an illustration which goes home to every one—a patented sewing-machine. It is now established that by putting on the machine, in addition to the notice of patent required by law, a notice called a license restriction, the right is acquired, as against the whole world, to control the purchase by users of the machine of thread, needles and oil lubricants or other materials convenient or necessary for operation of the machine. The illustrations might be multiplied indefinitely. That they are not imaginary is now a matter of common [56] knowledge, for, as the result of a case decided some years ago by one of the Circuit Courts of Appeal, which has been followed by cases in other Circuit Courts of Appeal, to which reference will hereafter be made, what prior to the first of those decisions on a sale of a patented article was designated a condition of sale, governed by the general principles of law, has come in practice to be denominated a license restriction, thus, by the change of form, under the doctrine announced in the cases referred to, bringing the matters covered by the restriction within the exclusive sway of the patent law. As the transformation has come about in practice since the decisions in question, the conclusion is that it is attributable as an effect caused by the doctrine of those cases. And, as I have previously stated, it is a matter of common knowledge that the change has been frequently resorted to for the purpose of bringing numerous articles of common use within the monopoly of a patent when otherwise they would not have been embraced therein, thereby tending to subject the whole of society to a widespread and irksome monopolistic control.

But I need not reason further, since, in my opinion, many adjudications of this court directly refute the existence of

a supposed right of extension by contract of the patent laws, and are therefore, as I understand them, in conflict with the ruling now made. In *Wilson* v. *Sandford* (1850), 10 How. 99, the facts were these: Wilson granted to Sandford and the other defendants the right to use a patented planing machine, the consideration to be paid in instalments. Each note contained a provision that the title should revert in case of non-payment. Upon the theory that the refusal to pay an instalment forfeited the rights of the licensees, Wilson sued to restrain the further use of the machine on the ground that such use was an infringement of his patent rights. It was, however, decided that the matter in controversy arose [57] upon contract, and that the requisite jurisdictional value was not involved. The claim that jurisdiction could be exercised because the case arose under the patent laws, was thus disposed of (p. 101):

"Now the dispute in this case does not arise under any act of Congress; nor does the decision depend upon the construction of any law in relation to patents. It arises out of the contract stated in the bill; and there is no act of Congress providing for or regulating contracts of this kind. The rights of the parties depend altogether upon common law and equity principles. The object of the bill is to have this contract set aside and declared to be forfeited; and the prayer is, 'that the appellant's reinvestiture of title to the license granted to the appellees, by reason of the forfeiture of the contract, may be sanctioned by the court,' and for an injunction. But the injunction he asks for is to be the consequence of the decree of the court sanctioning the forfeiture. He alleges no ground for an injunction unless the contract is set aside. And if the case made in the bill was a fit one for relief in equity, it is very clear that whether the contract ought to be declared forfeited or not, in a court of chancery, depended altogether upon the rules and principles of equity, and in no degree whatever upon any act of congress concerning patent rights. And whenever a contract is made in relation to them, which is not provided for and regulated by congress, the parties, if any dispute arises, stand upon the same ground with other litigants as to the right of appeal; and the decree of the circuit court cannot be revised here, unless the matter in dispute exceeds two thousand dollars."

The foregoing views were reiterated in *Bloomer* v. *McQuewan* (1852), 14 How. 539.

In *Hartshorn* v. *Day* (1856), 19 How. 211, the court, in commenting upon the effect upon a license, of the non-

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performance, by the licensee of a patent right, of cove-[58]nants made by him, and speaking in particular of a covenant to pay an annuity to one Chaffee, the patentee, said (p. 222):

"The payment of the annuity was not a condition to the vesting of the interest in the patent in Judson, and of course * * * the omission or refusal to pay did not give to Chaffee a right to rescind the contract, nor have the effect to remit him to his interest as patentee. The right to the annuity rested in covenant. * * * The remedy for the breach could rest only upon the personal obligation" of the covenantor.

The cases just referred to and others in accord with them were reviewed in the opinion in *Albright* v. *Teas*, 106 U. S. 613, decided in 1883. The case was this: A patentee sold and assigned all his title and interest in the invention covered by his patents, and the purchasers covenanted to use their best efforts to introduce the invention, to pay specified royalties for the use of the patented improvements, etc. The assignor sued in a state court for a discovery and account and a decree for the amount of royalties found due and for general relief. On the application of the defendants the cause was removed into a Circuit Court, upon the theory that the suit was one arising under the patent laws of the United States, and, in consequence, exclusively within the cognizance of the courts of the United States. On final hearing, however, the Circuit Court remanded the cause as being one for the settlement of controversies under a contract, of which the state court had full cognizance. This court held that as the transfer of title was absolute, no rights secured by the patent under any act of Congress remained in the patentee, and that the case arose solely upon the contract and not upon the patent laws of the United States.

The prior cases on the subject were again reviewed by Mr. Justice Gray in *Dale Tile Mfg. Co.* v. *Hyatt* (1888), 125 U. S. 46. The plaintiff sued in a state court to re-[59]cover from one, who had been licensed by a patentee to make and use certain patented articles, to recover royalties due under the contract. The defendant contended in the

state court that the subject-matter was one exclusively cognizable in the courts of the United States because the case was one arising under the patent laws, citing Rev. Stat., § 629, cl. 9; § 711, cl. 5. The contention was held untenable, and in the course of the opinion the court said (p. 52):

"It has been decided that a bill in equity in the Circuit Court of the United States by the owner of letters patent, to enforce a contract for the use of the patent right, or to set aside such a contract because the defendant has not complied with its terms, is not within the acts of Congress, by which an appeal to this court is allowable in cases arising under the patent laws, without regard to the value of the matter in controversy. Act of July 4, 1836, c. 357, § 17, 5 Stat. 124; Rev. Stat., § 699; *Wilson* v. *Sandford*, 10 How. 99; *Brown* v. *Shannon*, 20 How. 55."

Reviewing the decisions in *Hartell* v. *Tilghman*, 99 U. S. 547, and *Albright* v. *Teas*, *supra*, the court said (p. 53):

"It was said by Chief Justice Taney in *Wilson* v. *Sandford*, and repeated by the court in *Hartell* v. *Tilghman*, and in *Albright* v. *Teas*, 'The dispute in this case does not arise under any act of Congress; nor does the decision depend upon the construction of any law in relation to patents. It arises out of the contract stated in the bill; and there is no act of Congress providing for or regulating contracts of this kind. The rights of the parties depend altogether upon common law and equity principles.' 10 How. 101, 102; 99 U. S. 552; 106 U. S. 619.

"Those words are equally applicable to the present case, except that, as it is an action at law, the principles of equity have no bearing. This action, therefore, was within the jurisdiction, and, the parties being citizens of the same State, within the exclusive jurisdiction, of the [60] State courts; and the only federal question in the case was rightly decided."

The case of *Keeler* v. *Standard Folding Bed Co.*, 157 U. S. 659, touches upon the precise question before us. In the course of the opinion, the court said—italics mine—(p. 666):

"Upon the doctrine of these cases we think it follows that one who buys patented articles of manufacture from one authorized to sell them becomes possessed of an absolute property in such articles, unrestricted in time or place. Whether a patentee may protect himself and his assignees by special contracts brought home to the purchasers is not a question before us, and upon which we express no opinion.

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It is, however, obvious that such a question would arise as a question of contract, and not as one under the inherent meaning and effect of the patent laws."

A reference to the foregoing and other decided cases is contained in the opinion in *Excelsior Wooden Pipe Co.* v. *Pacific Bridge Co.*, 185 U. S. 282. The suit was by a licensee authorized to manufacture and sell wooden pipe under certain letters patent, against two defendants, one of whom was the licensor and owner of the patent. The covenants of the licensee were, (1) to pay a license fee or royalty; (2) not to transfer or assign the license without the consent of the patentee; and (3) that the license might be revoked for failure to manufacture. While, because of peculiar conditions present in the case, the suit was held to be one arising under the patent laws, the court yet observed (p. 290):

"Now, it may be freely conceded that, if the *licensee* had failed to observe any one of the three conditions of the license, the *licensor* would have been obliged to resort to the state courts either to recover the royalties, or to procure a revocation of the license. Such suit would not involve any question under the patent law."

The court, after reciting the facts in the case of *Pratt* v. [61] *Paris Gaslight & Coke Co.*, 168 U. S. 255, said (pp. 286, 287):

"It was held that the action was not one arising under the patent laws of the United States, and that to constitute such a cause the plaintiff must set up some right, title or interest under the patent laws, or at least make it appear that some right or privilege will be defeated by one construction or sustained by the opposite construction of those laws. That 'section 711 does not deprive the state courts of the power to determine *questions* arising under the patent laws, but only of assuming jurisdiction of *cases* arising under those laws. There is a complete distinction between a case and a question arising under the patent laws. The former arises when the plaintiff in his opening pleading—be it a bill, complaint or declaration—sets up a right under the patent laws as ground for a recovery. Of such the state courts have no jurisdiction. The latter may appear in the plea or answer or in the testimony. The determination of such question is not beyond the competency of the state tribunals.'"

The case of *Bement* v. *National Harrow Co.*, decided at the same term as the *Wooden Pipe Case*, illustrates the doctrine. In that case the National Harrow Company, the patentee, commenced the action in a state court of New York to re-

cover damages for the violation of license contracts pertaining to the manufacture and sale of a patent harrow and also sought to restrain the future violation of the contracts and compel their specific performance. If in consequence of the subject-matter the case was one arising under the patent laws, as it would have been if the question of infringement of the patent was involved, the jurisdiction of the courts of the United States was exclusive. The case was disposed of on its merits in the state courts and came to this court by writ of error upon the question as to whether the agreements between the licensor and licensee violated [62] the Federal Anti-Trust Law, and jurisdiction was entertained and the Federal question was passed upon.

Finally, it seems to me the rulings made in the *Morgan Envelope Case*, 152 U. S. 425, are so apposite here as practically in reason to foreclose all controversy on the question. In that case suit was brought on three patents, one for an oval roll of paper, the other two for apparatus for holding the paper. The patentee sold the fixtures or apparatus only to purchasers of his paper, with the understanding that the paper would be subsequently purchased of the plaintiff company. It was held that the patent for the roll of paper was invalid, but the validity of the apparatus claims, or at least of some of them, was not challenged. The defendant sold the paper with full knowledge of the restriction imposed by the patentee. Mr. Justice Brown, after quoting from *Chaffee* v. *Boston Belting Co.*, 22 How. 217, 223, says (pp. 432, 433):

"The real question in this case is, whether, conceding the combination of the oval roll with the fixture to be a valid combination, the sale of one element of such combination, with the intent that it shall be used with the other element, is an infringement. We are of opinion that it is not. . . . Of course, if the product itself is the subject of a valid patent, it would be an infringement of that patent to purchase such product of another than the patentee; but if the product be unpatentable, it is giving to the patentee of the machine the benefit of a patent upon the product, by requiring such product to be bought of him."

Earlier in the opinion it was said (p. 431):

"The first defense raises the question whether, when a machine is designed to manufacture, distribute, or serve out to users a certain

White, C. J., Hughes and Lamar, JJ., Dissenting.

article, the article so dealt with can be said to be a part of the combination of which the machine itself is another part. If this be so, then it would seem to follow that the log which is sawn in the [63] mill; the wheat which is ground by the rollers; the pin which is produced by the patented machine; the paper which is folded and delivered by the printing press, may be claimed as an element of a combination of which the mechanism doing the work is another element. The motion of the hand necessary to turn the roll and withdraw the paper is analogous to the motive power which operates the machinery in the other instances."

Nor when accurately appreciated is there any conflict between the principles so long and firmly established by the cases to which I have just referred and the doctrine upheld in the *Goodyear Rubber Case*, 9 Wall. 788, and *Mitchell* v. *Hawley*, 16 Wall. 544. In the *Goodyear Case* the facts were these: The right was conferred upon one Chaffee by license "to use the said Goodyear's gum elastic composition for coating cloth for the purpose of japanning, marbling, and variegate japanning, at his own establishment, but not to be disposed of to others for that purpose without the consent of the said Charles Goodyear; . . . the right and license hereby conferred being limited to the United States, and not extending to any foreign country, and not being intended to convey any right to make any contract with the Government of the United States." Looking at the terms of the license and the testimony in the record, the court considered the instrument only "to authorize the licensee to make and sell India rubber cloth, to be used in the place, and for the purpose, of patent or japanned leather." The patent was held to be infringed because a right of use of the invention not granted to the licensee but reserved by the patentee or his assignee to himself, viz.: "the exclusive right to manufacture and sell army and navy equipments made of vulcanized India rubber," etc., had been invaded by the defendants.

In *Mitchell* v. *Hawley* this was the controversy: A patentee of certain machines, whose original patent had [64] still between six and seven years to run, conveyed to another person the "right to make and use and to license to others the right to make and use four of the machines" in two States "during the remainder of the original term

of the letters-patent, *provided*, that the said grantee shall not in any way or form dispose of, sell, or grant any license to use the said machines *beyond* the said term." The licensee constructed and sold four machines to persons who, as found by the court, had knowledge of the limited title of the licensee. After the patent had expired, and during an extended term of the patent, the persons to whom the licensee had transferred the machines made use of the machines in violation of the limitation, and the owner of the patent sued to prevent the infringement, and his right to do so was upheld. Stating it to be unquestioned that a patentee who had absolutely parted with the title to the machine and with the use which the patent protected must be understood to have parted with all his exclusive right, and hence ceased to have any interest in the machine protected by the patent law, the court maintained the contentions of the complainant, on the ground that the rule just stated did not apply where the patentee did not grant the entire right covered by the patent, but retained a part thereof in himself, and therefore a violation of such reserved right was in conflict with a right still protected by the patent and an infringement of the patent. The difference between the rule applied in that case and the doctrine of the many other cases which we have cited and which also exists between the controversy presented in *Mitchell* v. *Hawley* and the one here under consideration was simply as follows: (*a*) That which exists between the conveyance of all one's rights covered by a patent and a transfer of only a part of such rights; (*b*) that which obtains between the ability of a patentee to protect the right which he enjoys under the patent law from infringement and his [65] want of power on parting with all his rights under the patent to contract so as to secure rights never embraced in his patent, and to bring such newly acquired contract rights under the protection of the patent law. That the sale here in question was one of all the rights which the patent protected has, it seems to me, at the outset been demonstrated beyond reasonable dispute. I mean, of course, within the limit of my powers of understanding, since, looking at the so-called

license restriction again and again with a purpose if possible to bring my mind to assent to the view which the court takes of it, I find it impossible to do so. And in this connection it is to be observed that the real nature of the transaction is, in the argument of counsel for the Dick Company, stated to be directly the opposite of that which the court now holds it to be. Thus, counsel say:

"In the license plan in issue, the licensor, by limiting the market at which supplies may be purchased, is merely insuring to himself a royalty based upon the output of the machine. The licensor, by requiring the purchase of ink of him, in fact exacting a royalty (infinitesimal in amount) for every copy of the original produced by the mimeograph. The very nature of the work of these machines forbids the use of a fixed money royalty upon the work produced, since the money value is so small that the expense of the accounting would be prohibitive of such a method."

A construction of the restriction which, by speaking of license and licensor, obscures the fact that the restriction itself states the transaction to have been a sale of the machine and its right of use, yet by the very force of the nature of the so-called restriction describes it as being in essence and effect but a consideration for the rights parted with, and thus brings the case within the doctrine of *Wilson* v. *Sandford*, *Albright* v. *Teas*, and other cases which I have referred to.

[66] The distinction between the two rules and the absolute harmony and coöperation between them had been pointed out before the decision in *Mitchell* v. *Hawley*, and has been since so clearly indicated as to my mind to leave no room for contention or evasion. Let me quote from some of the cases. In one of the early cases, *Bloomer* v. *McQuewan*, 14 How. 539, after referring to previous cases which had marked the distinction between the grant of the right to make and vend a patented machine and the grant of the right to use it, the court said (p. 549):

"The distinction is a plain one. The franchise which the patent grants, consists altogether in the right to exclude every one from making, using, or vending the thing patented, without the permission of the patentee. This is all that he obtains by the patent. And when he sells the exclusive privilege of making or vending it for use in a particular place, the purchaser buys a portion of the franchise which

the patent confers. He obtains a share of the monopoly, and that monopoly is derived from, and exercised under, the protection of the United States. . . .

"But the purchaser of the implement or machine for the purpose of using it in the ordinary pursuits of life, stands on different ground. In using it, he exercises no rights created by the act of congress, nor does he derive title to it by virtue of the franchise or exclusive privilege granted to the patentee. The inventor might lawfully sell it to him, whether he had a patent or not, if no other patentee stood in his way. And when the machine passes to the hands of the purchaser, it is no longer within the limits of the monopoly. It passes outside of it, and is no longer under the protection of the act of congress. And if his right to the implement or machine is infringed, he must seek redress in the courts of the State, according to the laws of the State, and not in the courts of the United States, nor under the law of congress granting the patent. The implement or machine becomes his private individual [67] property, not protected by the laws of the United States, but by the laws of the State in which it is situated. Contracts in relation to it are regulated by the laws of the State, and are subject to state jurisdiction."

Likewise in *Adams* v. *Burke*, 17 Wall. 453, the court, speaking through Mr. Justice Miller, said (p. 456):

"In the essential nature of things, when the patentee, or the person having his rights, sells a machine or instrument whose sole value is in its use, he receives the consideration for its use and he parts with the right to restrict that use. The article, in the language of the court, passes without the limit of the monopoly. That is to say, the patentee or his assignee having in the act of sale received all the royalty or consideration which he claims for the use of his invention in that particular machine or instrument, it is open to the use of the purchaser without further restriction on account of the monopoly of the patentee."

Yet, again, in the *Folding Bed Company Case*, 157 U. S. 659, 666, this court, reiterating the doctrine, said:

"Upon the doctrine of these cases we think it follows that one who buys patented articles of manufacture from one authorized to sell them becomes possessed of an absolute property in such articles, unrestricted in time or place. Whether a patentee may protect himself and his assignees by special contracts brought home to the purchasers is not a question before us, and upon which we express no opinion. It is, however, obvious that such a question would arise as a question of contract, and not as one under the inherent meaning and effect of the patent laws.

"The conclusion reached does not deprive a patentee of his just rights, because no article can be unfettered from the claim of his

monopoly without paying its tribute. The inconvenience and annoyance to the public that an opposite conclusion would occasion are too obvious to require illustration."

[68] In view of the settled rule of this court, established by so many decisions, I might well refrain from referring to the English cases and the decisions of lower Federal courts relied on as persuasively supporting the doctrine now announced. But, nevertheless, I shall briefly notice the cases.

I pass by the English decisions relied upon with the remark that it is not perceived how they can have any persuasive influence on the subject in hand in view of the distinction between state and national power which here prevails and the consequent necessity, if our institutions are to be preserved, of forbidding a use of the patent laws which serves to destroy the lawful authority of the States and their public policy. I fail also to see the application of English cases in view of the possible difference between the public policy of Great Britain concerning the right, irrespective of the patent law, to make contracts with the monopolistic restriction which the one here recognized embodies and the public policy of the United States on that subject as established, after great consideration, by this court in *Dr. Miles Medical Co.* v. *Park & Sons Co.*, 220 U. S. 373. See especially on this subject the grounds for dissent in that case expressed by Mr. Justice Holmes, referring to the English law, on page 413.

So far as the various decisions of Circuit Courts of Appeals which the court refers to are concerned, as they conflict with the many adjudications of this court to which I have referred, it seems to me they ought not to be followed, but should be overruled. It is undoubted that the leading one of the cases which all the others but follow and reiterate is the *Button Fastener Case* to which I have previously referred. I shall not undertake to review that case elaborately, because in substance and effect the theory upon which it proceeds is in absolute conflict with the many adjudications of this court to which I have referred, and the reasoning which was employed in the case, in my [69] opinion, in its ulti-

mate aspect rests upon a failure to distinguish between the principle announced in *Wilson* v. *Sandford*, and followed and applied in the many cases which I have reviewed, and the doctrine announced and applied in *Mitchell* v. *Hawley*. In other words, the *Button Fastener Case* and the confusion which has followed the application of the ruling made in that case was but the consequence of failing to observe the difference between the rights of a patentee which were protected by the patent and those which arose from contract and therefore were subject alone to the general law. In addition it may be well to observe that the very groundwork upon which the case proceeded has been since authoritatively declared by this court to be without foundation. For instance, it will become apparent from an analysis of the opinion in the case that it proceeded upon the theory that the doctrine upheld had been virtually sanctioned in previous adjudications of this court. Since the decision, however, this court, in *Bobbs-Merrill Co.* v. *Straus*, 210 U. S. 339, 345, has expressly declared that the doctrine had never been upheld by this court. Moreover, also, in the *Bobbs-Merrill Case* this court, in considering one of the cases principally relied upon, in the opinion in the *Button Fastener Case*—the *Cotton Tie Case*—expressly pointed out that that case had been misconceived in the opinion in the *Button Fastener Case*, and did not have the significance which had there been attributed to it.

But even if I were to put aside everything I have said and were to concede for the sake of argument that the power existed in a patentee, by contract, to accomplish the results which it is now held may be effected, I nevertheless would be unable to give my assent to the ruling now made. If it be that so extraordinary a power of contract is vested in a patentee, I cannot escape the conclusion that its exercise, like every other power, should be subject to the law of the land. To conclude otherwise [70] would be but to say that there was a vast zone of contract lying between rights under a patent and the law of the land, where lawlessness prevailed and wherein contracts could be made whose effect and operation would not be confined to the area described, but

would be operative and effective beyond that area, so as to dominate and limit rights of every one in society, the law of the land to the contrary notwithstanding.

Again, a curious anomaly would result from the doctrine. The law in allowing the grant of a patent to the inventor does not fail to protect the rights of society; on the contrary, it safeguards them. The power to issue a patent is made to depend upon considerations of the novelty and utility of the invention and the presence of these prerequisites must be ascertained and sanctioned by public authority, and although this authority has been favorably exerted, yet when the rights of individuals are concerned the judicial power is then open to be invoked to determine whether the fundamental conditions essential to the issue of the patent existed. Under the view now maintained of the right of a patentee by contract to extend the scope of the claims of his patent it would follow that the incidental right would become greater than the principal one, since by the mere will of the party rights by contract could be created, protected by the patent law, without any of the precautions for the benefit of the public which limit the right to obtain a patent.

I have already indicated how, since the decision in the *Button Fastener Case*, the attempt to increase the scope of the monopoly granted by a patent has become common by resorting to the device of license restrictions manifested in various forms, all of which tend to increase monopoly and to burden the public in the exercise of their common rights. My mind cannot shake off the dread of the vast extension of such practices which must come from the decision of the court now rendered. Who, I submit, [71] can put a limit upon the extent of monopoly and wrongful restriction which will arise, especially if by such a power a contract which otherwise would be void as against public policy may be successfully maintained?

What could more cogently serve to point to the reality and conclusiveness of these suggestions than do the facts of this case? It is admitted that the use of the ink to work the patented machine was not embraced in the patent and

yet it is now held that by contract the use of materials not acquired from a designated source has become an infringement of the patent, and exactly the same law is applied as though the patent in express terms covered the use of ink and other operative materials. It is not, as I understand it, denied, and if it were, in the face of the decision in the *Miles Medical Co. Case*, *supra*, in reason it cannot be denied that the particular contract which operates this result if tested by the general law would be void as against public policy. The contract, therefore, can only be maintained upon the assumption that the patent law and the issue of a patent is the generating source of an authority to contract to procure rights under the patent law not otherwise within that law, and which could not be enjoyed under the general law of the land. But here, as upon the main features of the case, it seems to me this court has spoken so authoritatively as to leave no room for such a view. In *Pope Manufacturing Company* v. *Gormully*, 144 U. S. 224, the validity of certain stipulations contained in a license to use patented inventions came under consideration. It was decided that contracts of that character, like all others, were to be measured by the law of the land and were non-enforcible if they were contrary to general rules of public policy. And it was further held that even if contracts of that character were not void as against general principles of public policy, the aid of a court of equity would not be given to their enforcement if the stipulations were unconscionable and [72] oppressive, as are, in my judgment, aside from the rule of public policy, the stipulations of the contract here involved.

Indeed, when the decree rendered by the lower court which is now affirmed and which is excerpted in the margin [1]

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[1] The Circuit Court granted a decree in favor of the complainant for an accounting of profits and damages and for an injunction restraining the defendants from infringing upon the said letters patent and "from directly or indirectly procuring or attempting to procure, inducing or attempting to induce or causing any breach or violation of the covenant, condition or obligation now existing or which may hereafter exist on the part of vendees or licensees of said patented and restricted rotary mimeographs to the complainant by reason of

is considered, it seems to me the conclusion cannot be escaped that although in the mental process by which it was held that relief under the patent law could [73] be afforded the contract was treated as a restriction upon the use of the machine covered by the patent, so inexorable was the contrary result of the contract that in framing the decree it became necessary to give relief upon the theory that the gravamen of the suit was the violation of a contract stipulation in regard to unpatented materials.

For these reasons I, therefore, dissent.

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the license restrictions hereinbefore set out and particularly from directly or indirectly making or causing to be made, or selling or causing to be sold, or offering or causing to be offered, to any person or concern whatsoever, any supplies adapted for use or capable of being used on said patented or restricted mimeographs with design or intent that the same shall be so used in violation of such license restriction; from directly or indirectly persuading or inducing such persons or concerns to purchase any such supplies not of the complainant's manufacture and sale, designed or adapted for use in such machines for use thereon in violation of such license; from advertising or causing to be advertised in any manner any supplies intended or designed for use in said rotary mimeographs in violation of such license; from publishing or causing to be published any offer, promise or inducement designed or intended to procure lincensees or vendees of the said patented and restricted rotary mimeographs to use or purchase for use in such machine supplies not of the manufacture of the complainant in violation of such license, and from doing and performing any and all other acts or things designed or intended to persuade or induce said licensees or vendees to violate the condition or covenant binding upon them with respect to the use of said rotary mimeograph and from in any way further interfering with the business of the said complainant of marketing said machines and supplies therefor under license restrictions limiting such machines to use only in conjunction with supplies made by or procured from said complainant.

Syllabus.

BAUER & CIE *v.* O'DONNELL.[a]

CERTIFICATE FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 951. Argued April 10, 1913.—Decided May 26, 1913.

[229 U. S., 1.]

The right to make, use and sell an invented article existed without, and before, the passage of the patent law; the act secured to the inventor the exclusive right to make, use and vend the thing patented.[b]

While the patent law should be fairly and liberally construed to effect the purpose of Congress to encourage useful invention, the rights and privileges which it bestows should not be extended by judicial construction beyond what Congress intended.

In framing the patent act and defining the rights and privileges of patentees thereunder Congress did not use technical or occult phrases, but in simple terms gave the patentee the exclusive right to make, use and vend his invention for a definite term of years.

A patentee may not by notice limit the price at which future retail sales of the patented article may be made, such article being in the hands of a retailer by purchase from a jobber who has paid to the agent of the patentee the full price asked for the article sold. *Henry* v. *Dick Co.*, 224 U. S. 1, distinguished.

The patent law differs from the copyright law in that it not only confers the right to make and sell, but also the exclusive right to use the subject-matter of the patent.

[2] The words "vend" and "vending" as used in § 4952, Rev. Stat., in regard to the copyright protection accorded authors and as used in § 4884, Rev. Stat., in regard to the protection accorded inventors for their patented articles, are substantially the same, and the protection intended to be secured to authors and inventors is subsantially identical.

While *Bobbs-Merrill Co.* v. *Straus*, 210 U. S. 339, recognized that there are differences between the copyright statute and the patent statute, and disclaimed then deciding the effect of the word "vending" as used in the latter, this court now decides that the terms used in regard to the protection accorded by both statutes in regard to the exclusive right to sell are to all intents the same.

The right given by the patent law to the inventor to use his invention should be protected by all means properly within the scope

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[a] See Note (b) to the case of *Henry* v. *A. B. Dick Co.* (224 U. S., 1), *ante*, p. 731.

[b] Syllabus and statements of arguments copyrighted, 1912, by The Banks Law Publishing Company.

Argument for Appellants.

of the statute, and the patentee may transfer a patented article with a qualified title as to its use. *Henry v. Dick Co.*, 224 U. S. 1.

Where the transfer of the patented article is full and complete, an attempt to reserve the right to fix the price at which it shall be resold by the vendee is futile under the statute. It is not a license for qualified use, but an attempt to unduly extend the right to vend. *Henry* v. *Dick Co.*, 224 U. S. 1, distinguished.

While the patent law creates to a certain extent a monopoly by the inventor in the patented article, a patentee who has parted with the article patented by passing title to a purchaser has placed the article beyond the limits of the monopoly secured by the act. *Adams* v. *Burke*, 17 Wall. 453.

[57 L. Ed., 1041.[a]]

[PATENTS—RESTRICTIONS ON SALES BY PURCHASERS.—1. The exclusive right to "make, use, and vend the invention or discovery," granted by U. S. Rev. Stat. § 4884, U. S. Comp. Stat. 1901, p. 3381, to the patentee, his heirs and assigns, does not include the right to limit by notice the price at which the patented article may be resold at retail by a purchaser from jobbers who have paid to the patentee's agent the full price asked.

For other cases, see Patents, XIII. f, in Digest Sup. Ct. 1908.

PATENTS—SALE OR LICENSE—NOTICE OF PRICE RESTRICTION.—2. Attaching a notice to a patented article which states that the article is licensed for sale and use at a specified price, that a purchase is an acceptance of the conditions, and that all rights revert to the patentee in the event of a violation of the restriction, cannot convert an otherwise apparently unqualified sale into a mere license to use the invention.

For other cases, see Patents, XIII. d, in Digest Sup. Ct. 1908.]

THE facts, which involve the construction of § 4884, Rev. Stat., and the extent of the rights thereunder of patentees to control the price at which the patented article shall be sold by their vendees, are stated in the opinion.

Mr. Edwin J. Prindle for plaintiffs-appellants:

The inventor has the right to exclude every one from any making, using, or selling of the patented invention. Therefore, when he grants any right under the patent to anyone, he simply waives his right to exclude them from all making,

[a] The paragraphs following, in brackets, comprise the syllabus of this case as reported in vol. 57, p. 1041, Lawyers Edition, Supreme Court Reports.

using, or selling of the patented invention to that extent, and all ungranted right of exclusion remains in him.

[3] A notice of price restriction on a package is notice to all the world that the right to sell the article below the price stated on the package is not granted and does not pass from the inventor.

Defendant's sale at a retail price below the amount named, of packages bought from jobbers and having the license restriction label on them, was an infringement.

Price restrictions have been sustained in this court and in the lower Federal courts. *Mitchell* v. *Hawley*, 16 Wall. 544; *Henry* v. *Dick*, 224 U. S. 1; *Bement* v. *National Harrow Co.*, 186 U. S. 70.

The right of a patentee to restrict the price at which his article shall be sold by a license-restriction notice attached to the article, of the same import as the notice in the present case, has been sustained by many of the lower courts in the United States and by the courts of England. *Victor Talking Machine* v. *The Fair*, 123 Fed. Rep. 424; *New Jersey Patent Co.* v. *Schaefer*, 144 Fed. Rep. 437; *Rubber Tire Wheel Co.* v. *Milwaukee R. W. Co.*, 154 Fed. Rep. 358; *Goshen Rubber Works* v. *Single Tube A. & B. Tire Co.*, 166 Fed. Rep. 431; *Edison* v. *Ira M. Smith Co.*, 188 Fed. Rep. 925; *Waltham Watch Co.* v. *Keene*, 191 Fed. Rep. 855; *Automatic Pencil Sharpener Co.* v. *Goldsmith Bros.*, 190 Fed. Rep, 205; *Indiana Mfg. Co.* v. *Nichols*, 190 Fed. Rep. 579; *Incandescent Gas Co.* v. *Cantelo*, 12 Rep. Pat. Cas. 262; *Same* v. *Brogden*, 16 Rep. Pat. Cas. 183; *Badische Analin &c.* v. *Isler* (1906), 1 Chancery, 611; *McGruther* v. *Pitcher* (1904), 2 Chancery, 306; *National Phonograph Co.* v. *Mench*, 27 T. L. R. 239; *The B. V. D. Co.* v. *Wolf* (unreported); *The Fair* v. *Dover Mfg. Co.*, 166 Fed. Rep. 117; *Edison Phonograph Co.* v. *Kaufmann*, 105 Fed. Rep. 960; *Edison Phonograph Co.* v. *Pike*, 116 Fed. Rep. 863; *National Phonograph Co.* v. *Schlegel*, 128 Fed. Rep. 733; *Ingersoll* v. *Shellenberg*, 147 Fed. Rep. 522; *Winchester Arms Co.* v. *Buengar*, 199 Fed. Rep. 786; *American Graphophone Co.* v. *Pickard*, 201 Fed.
[4] Rep. 546; *Lovell-McConnell Co.* v. *International Automobile League*, 202 Fed. Rep. 219.

Argument for Appellants.

Many of the foregoing cases are identical, in principle, with the facts in the present case.

The patentee's control over selling was recognized by this court in *Henry* v. *Dick*, 224 U. S. 1.

The right of the patentee to restrict the price at which his article shall be sold comes within the principle decided in *Henry* v. *Dick*, and the defendant in this case is a contributory infringer precisely as Henry was in that case.

The patentee's monopoly of selling is coördinate with that of using his patented article and subject to the same degree of control. *Adams* v. *Burke*, 17 Wall. 453; *Bement* v. *National Harrow Co.*, *supra; Standard Sanitary Co.* v. *United States*, 226 U. S. 20.

Plaintiffs did not receive the full consideration for the patented article when they received the purchase money from the defendant or the jobber, and they have a continuing interest in the article.

Patentee's control over the price of his article is reasonable, proper and consistent with sound public policy.

Defendant's purchase from jobber instead of from plaintiffs does not relieve him from infringement, as he had notice through the price restriction on the label. *Victor Talking Machine Co.* v. *The Fair*, 123 Fed. Rep. 427; *New Jersey Patent Co.* v. *Schaefer*, 144 Fed. Rep. 437; *S. C.*, 159 Fed. Rep. 171; *Edison* v. *Smith*, 188 Fed. Rep. 925; *Automatic Pencil Co.* v. *Goldsmith*, 190 Fed. Rep. 205.

The *Waltham Watch Case*, 191 Fed. Rep. 855, has no bearing on the case at bar, and the language quoted had no reference to the distinction in the present case. So also as to the *Folding Bed Case*, 147 U. S. 659.

There is no attempt in this case at monopoly or to restrict trade. The patentee only seeks to control the price [5] of an article in an industry which he himself has created, and in which the public has had no previous rights or experience of free competition in the article. The public is just as free to purchase unpatented articles as it ever was, and the monopoly which the law gives the patentee is only the inducement which it held out to the patentee to make the invention and the just and proper price paid for his contribution of it

forever to public knowledge at the expiration of the monopoly.

The defense based on the copyright statute and *Bobbs-Merrill* v. *Straus*, 210 U. S. 339, does not apply. Judge Ray in his decision in the *Waltham Watch Case* argues at length that as the Supreme Court in the *Bobbs-Merrill Case* held that an author has no right to fix the price at which his book should be resold, it follows that an inventor is also without that right.

This court in that case expressly refused to express an opinion as to whether, under the state of facts in the present case, its decision would be the same as it was in that case.

These three separate rights of making, using and selling granted the inventor by the patent statute have always been treated as coördinate rights and never been treated as of different rank.

The right to sell is always treated as coördinate with the right to make and use in the patent cases, while as decided in the *Bobbs-Merrill Case*, the right to sell under the copyright statute is merely incidental to the right of duplication.

There are vital differences between the right to vend of the inventor and the right to vend of the author. And because of the differences in the nature of a patented article and an author's book, there are vital differences in what is involved in "vending" under the two statutes.

The power of an inventor to sub-divide the right to vend, [6] granted by his patent, has been repeatedly upheld. On the other hand, the author can only assign his right as a whole. He could not sub-divide the territory in any such way. See *Bobbs-Merrill Case*, 147 Fed. Rep. 23; *Crown Co.* v. *Standard Brewery*, 174 Fed. Rep. 258.

Rights under the patent statute are much broader than those under the copyright statute. The patent statute gives a complete monopoly of the invention. The copyright statute only gives the right of duplicating and the right of vending. "Making" under the patent statute covers every form of the invention which performs the same function in substantially the same way, without regard to appearance.

The patent statute gives the inventor absolute control over the use of the invention and the inventor can forbid

its use in any but a particular locality. No author, however, could restrict the reading of his book only to the person who purchases it, or to its being read only in a certain town.

The monopoly granted to the inventor is very much more extensive than that granted to the author, and the scope of "vending" under the patent statute cannot be measured by the scope of "vending" under the copyright statute. *The Fair* v. *Dover Mfg. Co.*, 166 Fed. Rep. 117; *Automatic Pencil Co.* v. *Goldsmith*, 190 Fed. Rep. 205; *Indiana Mfg. Co.* v. *Nichols*, 190 Fed. Rep. 579; *Edison* v. *Smith*, 188 Fed. Rep. 925; *Waltham Watch Co.* v. *Keene*, 191 Fed. Rep. 855.

The cases cited by defendant, to-wit: *Bloomer* v. *McQuewan*, 14 How. 539; *Adams* v. *Burke*, 17 Wall. 453; *Chaffee* v. *Boston Belting Co.*, 22 How. 217; *Morgan Envelope Co.* v. *Albany Paper Co.*, 152 U. S. 425; *Keeler* v. *Standard Folding Bed Co.*, 157 U. S. 659; *Bement* v. *National Harrow Co.*, 186 U. S. 70, do not sustain his proposition to the effect that a sale of a patented article under a license restriction borne by that article, and known to the pur[7]chaser, frees the article from the restrictions. *Patterson* v. *Kentucky*, 97 U. S. 501.

Defendant's right in the physical materials of the packages of Sanatogen which he bought is unquestioned. He has, however, no right to use those materials in violation of the reserved portion of monopoly, namely, to sell the package at a retail price lower than one dollar. *Henry* v. *Dick*, 224 U. S. 1.

Plaintiffs' patent grants them the right to exclude all others from any making, using or selling of the patented invention. In *Henry* v. *Dick*, the right was sustained of a patentee to enjoin others from violation of conditions as to use attached to a sale.

The patentee's control over selling is coördinate and coextensive with that over using his invention.

Plaintiffs did not receive the full consideration for the patented article when they received the purchase money, and they have a continuing interest in the article.

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The patentee's control over the price of his patented article is reasonable, proper and consistent with sound public policy.

This court has recognized the patentee's control over the resale price of his patented article, and such control comes within the principle decided in *Henry* v. *Dick*.

Mr. Daniel W. Baker, with whom *Mr. Frank J. Hogan* was on the brief, for O'Donnell, defendant-appellee.

Mr. Frederick P. Fish and *Mr. Thomas W. Pelham*, by leave of the court and on behalf of the Gillette Safety Razor Company, filed a brief in support of plaintiffs' contention.

Mr. Horace Pettit, by leave of the court and on behalf of the Victor Talking Machine Company, also filed a brief in support of plaintiffs' contention.

[8] MR. JUSTICE DAY delivered the opinion of the court.

This case is on a certificate from the Court of Appeals of the District of Columbia. The facts stated in the certificate are:

"Bauer & Cie, of Berlin, Germany, copartners, being the assignees of letters patent of the United States, dated April 5, 1898, No. 601,995, covering a certain water soluble albumenoid known as 'Sanatogen' and the process of manufacturing the same, about July, 1907, entered into an agreement with F. W. Hehmeyer, doing business in the City of New York under the trade name of The Bauer Chemical Company, whereby Hehmeyer became and has since been the sole agent and licensee for the sale of said product in the United States, the agreement contemplating that Hehmeyer should have power to fix the price of sale to wholesalers or distributors and to retailers, and to the public. The agreement further contemplated that said product should be furnished Hehmeyer at manufacturing cost, the net profits obtained by him to be shared equally by the parties to the agreement. Since April, 1910, this product has been uniformly sold and supplied to the trade and to the public by the appellants and their licensees in sealed packages bear-

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ing the name 'Sanatogen,' the words 'Patented in U. S. A., No. 601,995,' and the following:

"'NOTICE TO THE RETAILER.

"'This size package of Sanatogen is licensed by us for sale and use at a price not less than one dollar ($1.00). Any sale in violation of this condition, or use when so sold, will constitute an infringement of our patent No. 601,995, under which Sanatogen is manufactured, and all persons so selling or using packages or contents will be liable to injunction and damages.

"'A purchase is an acceptance of this condition. All [9] rights revert to the undersigned in the event of violation.

"'THE BAUER CHEMICAL CO.'

"The appellee is the proprietor of a retail drug-store at 904 F Street, N. W., in this city. He purchased of the Bauer Chemical Company for his retail trade original packages of said Sanatogen bearing the aforesaid notice. These packages he sold at retail at less than one dollar and, persisting in such sales, appellants in March, 1911, severed relations with him. Thereupon appellee, without the license or consent of the appellants, purchased from jobbers within the District of Columbia, said jobbers having purchased from appellants, original packages of said product bearing the aforesaid notice, sold said packages at retail at less than the price fixed in said notice, and avers that he will continue such sales."

The question propounded is: "Did the acts of the appellee, in retailing at less than the price fixed in said notice, original packages of 'Sanatogen' purchased of jobbers as aforesaid, constitute infringement of appellants' patent?"

The protection given to inventors and authors in the United States originated in the Constitution, § 8 of Art. I of which authorizes the Congress "to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." This protection, so far as inventors are concerned, has been conferred by an act of Congress passed April 10, 1790, and subsequent acts and amendments. The act of 1790, 1 Stat. 109, c. 7, granted "the sole

and exclusive right and liberty of making, constructing, using and vending to others to be used, the said invention or discovery." In 1793 (Feb. 21, 1793, 1 Stat. 318, c. 11) the word "full" was substituted for the word "sole," and in 1836 (July 4, 1836, 5 Stat. 117, § 5, [10] c. 357) the word "constructing" was omitted. This legislation culminated in § 4884 of the Revised Statutes, the part with which we are dealing being practically identical with the act of July 8, 1870, 16 Stat. 198, § 22, c. 230. It provides that every patent shall contain "a grant to the patentee, his heirs and assigns, for the term of seventeen years, of the exclusive right to make, use, and vend the invention or discovery."

The right to make, use and sell an invented article is not derived from the patent law. This right existed before and without the passage of the law and was always the right of an inventor. The act secured to the inventor the *exclusive* right to make, use and vend the thing patented, and consequently to prevent others from exercising like privileges without the consent of the patentee. *Bloomer* v. *McQuewan*, 14 How. 539, 549; *Continental Paper Bag Co.* v. *Eastern Paper Bag Co.*, 210 U. S. 405, 425. It was passed for the purpose of encouraging useful invention and promoting new and useful improvements by the protection and stimulation thereby given to inventive genius, and was intended to secure to the public, after the lapse of the exclusive privileges granted, the benefit of such inventions and improvements. With these beneficent purposes in view the act of Congress should be fairly or even liberally construed; yet, while this principle is generally recognized, care should be taken not to extend by judicial construction the rights and privileges which it was the purpose of Congress to bestow.

In framing the act and defining the extent of the rights and privileges secured to a patentee Congress did not use technical or occult phrases, but in simple terms gave an inventor the exclusive right to make, use and vend his invention for a definite term of years. The right to make can scarcely be made plainer by definition, and embraces the construction of the thing invented. The right to use is a comprehensive term and embraces within its meaning [11] the right to put into

service any given invention. And Congress did not stop with the express grant of the rights to make and to use. Recognizing that many inventions would be valuable to the inventor because of sales of the patented machine or device to others, it granted also the exclusive right to vend the invention covered by the letters patent. To vend is also a term readily understood and of no doubtful import. Its use in the statute secured to the inventor the exclusive right to transfer the title for a consideration to others. In the exclusive rights to make, use and vend, fairly construed, with a view to making the purpose of Congress effectual, reside the extent of the patent monopoly under the statutes of the United States. *Bloomer* v. *McQuewan*, *supra*, 549. We need not now stop to consider the rights to sell and convey, and to license others to sell or use inventions, which rights have been the subject of consideration in the numerous reported cases to be found in the books. We are here concerned with the construction of the statute in the aspect and under the facts now presented.

The case presented pertains to goods purchased by jobbers within the District of Columbia and sold to the appellee at prices not stated, and resold by him at retail at less than the price of one dollar fixed in the notice. The question therefore now before this court for judicial determination is: May a patentee by notice limit the price at which future retail sales of the patented article may be made, such article being in the hands of a retailer by purchase from a jobber who has paid to the agent of the patentee the full price asked for the article sold?

The object of the notice is said to be to effectually maintain prices and to prevent ruinous competition by the cutting of prices in sales of the patented article. That such purpose could not be accomplished by agreements concerning articles not protected by the patent monopoly was settled by this court in the case of *Dr. Miles Medical* [12] *Co.* v. *Park & Sons Co.*, 220 U. S. 373, in which it was held that an attempt to thus fix the price of an article of general use would be against public policy and void. It was doubtless within the power of Congress to confer such right of restriction

upon a patentee. Has it done so? The question has not been determined in any previous case in this court, so far as we are aware. It was dealt with under the copyright statute, however, in the case of *Bobbs-Merrill Co.* v. *Straus*, 210 U. S. 399. In that case it was undertaken to limit the price of copyrighted books for sale at retail by a notice on each book fixing the price at one dollar and stating that no dealer was licensed to sell it for less and that a sale at a less price would be treated as an infringement of the copyright. It was there held that the statute, in securing to the holder of the copyright the sole right to vend copies of the book, conferred a privilege which, when the book was sold, was exercised by the holder, and that the right secured by the statute was thereby exhausted. The court also held that it was not the purpose of the law to grant the further right to qualify the title of future purchasers by means of the printed notice affixed to the book, and that to give such right would extend the statute beyond its fair meaning and secure privileges not intended to be covered by the act of Congress. In that case it was recognized that there are differences between the copyright statute and the patent statute, and the purpose to decide the question now before us was expressly disclaimed.

Section 4952, Revised Statutes, a part of the copyright act, secures to an author, inventor, designer or proprietor of books, maps, charts or dramatic or musical compositions the sole liberty of printing, reprinting, publishing, completing, copying, executing, finishing and vending them. While that statute differs from the patent statute in terms and in the subject-matter intended to be protected, it is apparent that in the respect involved in the present [13] inquiry there is a strong similarity between and identity of purpose in the two statutes. In the case of patents the exclusive right to vend the invention or discovery is added to the like right to make and use the subject-matter of the grant, and in the case of copyrights the sole right of multiplying and reproducing books and other compositions is coupled with the similar right of "vending the same." So far as the use of the terms "vend" and "vending" is concerned, the protection intended to be secured is substantially

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identical. The sale of a patented article is not essentially different from the sale of a book. In each case to vend is to part with the thing for a consideration. It is insisted that the purpose to be subserved by notices such as are now under consideration—keeping up prices and preventing competition—is more essential to the protection of patented inventions than of copyrighted articles; and it is said that the copyrighted article may be and usually is sold for a lump consideration by the author or composer and that he has no interest in the subsequent sales of the work, while patented inventions require large outlays to create and maintain a market. To some extent this contention may be based upon fact, nevertheless it is well known that in many instances the compensation an author receives is the royalties upon sales of his book or a percentage of profits, which makes it desirable that he shall have the protection of devices intended to keep up the market and prevent the cutting of prices. But these considerations could have had little weight in framing the acts. In providing for grants of exclusive rights and privileges to inventors and authors we think Congress had no intention to use the term "vend" in one sense in the patent act and "vending" in another in the copyright law. Protection in the exclusive right to sell is aimed at in both instances, and the terms used in the statutes are to all intents the same.

It is apparent that the principal difference in the enact-
[14] ments lies in the presence of the word "use" in the patent statute and its absence in the copyright law. An inventor has not only the exclusive right to make and vend his invention or discovery, but he has the like right to use it, and when a case comes fairly within the grant of the right to use, that use should be protected by all means properly within the scope of the statute. In *Bement* v. *National Harrow Co.*, 186 U. S. 70, the owner of a patent granted a license to the defendant to manufacture and sell harrows embodied in the invention covered by the patent. The license provided for the payment to the licensor by the licensee of a royalty of one dollar for each harrow or frame sold and stipulated that the licensee was not to sell to any

person for a less price than that named, and that the license was subject to change from time to time. The case was one arising upon license agreements, originating in a state court, and did not involve the construction of the patent act in the circumstances now disclosed.

Chief reliance, however, of the plaintiff in this case is upon the recent decision of this court in *Henry* v. *Dick Co.*, 224 U. S. 1. An examination of the opinion in that case shows that the restriction was sustained because of the right to use the machine granted in the patent statute, distinguishing in that respect the patent from the copyright act. In that case a patented mimeograph had been sold which bore an inscription in the form of a notice that the machine was sold with the license restriction that it might only be used with stencil, ink and other supplies made by the A. B. Dick Company, the owners of the patent. The alleged infringer sold to the purchaser of the mimeograph a can of ink suitable for use with the machine with full knowledge of the restriction and with the expectation that the ink sold would be used in connection with the machine. It is expressly stated in the opinion that the machine was sold at cost or less and that the patentee depended upon the profit realized from the sale [15] of the non-patented articles to be used with the machine for the profit which he expected to realize from his invention (224 U. S. 26). After commenting upon the copyright statutes and the resemblance between the author's right to vend copies of his work and the patentee's right to vend the patented thing, it was said (p. 46):

"To the inventor, by § 4884, Revised Statutes, there is granted 'the exclusive right to make, *use* and vend the invention or discovery.' This grant, as defined in *Bloomer* v. *McQuewan*, 14 How. 539, 549, 'consists altogether in the right to exclude every one from making, *using* or vending the thing patented.' Thus, there are several substantive rights, and each is the subject of sub-division, so that one person may be permitted to make, but neither to sell nor use the patented thing. To another may be conveyed the right to sell, but within a limited area, or for a particular use, while to another the patentee may grant only the right to make and use, or to use only for specific purposes. *Adams* v. *Burks*, 17 Wall. 453; *Mitchell* v. *Hawley*, 16 Wall. 544; *Rubber Co.* v. *Goodyear*, 9 Wall. 788, 799."

(Italics in the original opinion.)

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That case was distinguished from *Bobbs-Merrill* v. *Straus*, *supra*, construing the copyright act, because of the difference in the terms of the copyright and patent statutes, the patent act conferring not only the right to make and sell, but the exclusive right to *use* the subject-matter of the patent. It was under the right to use that the license notice in question was sustained, and it is obvious that the notice in that case dealt with the use of the machine and limited it to use only with the paper, ink and supplies of the manufacture of the patentee. While the title was transferred, it was a qualified title, giving a right to use the machine only with certain specified supplies. It was said in the *Dick Case* (p. 47) that "there is no collision whatever between the decision in the *Bobbs-Merrill Case* and the present opinion. Each rests upon a [16] construction of the applicable statute, and the special facts of the cases."

It is contended in argument that the notice in this case deals with the use of the invention, because the notice states that the package is licensed "for sale and use at a price not less than one dollar," that a purchase is an acceptance of the conditions, and that all rights revert to the patentee in event of violation of the restriction. But in view of the facts certified in this case, as to what took place concerning the article in question, it is a perversion of terms to call the transaction in any sense a license to use the invention. The jobber from whom the appellee purchased had previously bought, at a price which must be deemed to have been satisfactory, the packages of Sanatogen afterwards sold to the appellee. The patentee had no interest in the proceeds of the subsequent sales, no right to any royalty thereon or to participation in the profits thereof. The packages were sold with as full and complete title as any article could have when sold in the open market, excepting only the attempt to limit the sale or use when sold for not less than one dollar. In other words, the title transferred was full and complete with an attempt to reserve the right to fix the price at which subsequent sales could be made. There is no showing of a qualified sale for less than value for limited use with other articles only, as was shown in the *Dick Case*. There

was no transfer of a limited right to use this invention, and to call the sale a license to use is a mere play upon words.

The real question is whether in the exclusive right secured by statute to "vend" a patented article there is included the right, by notice, to dictate the price at which subsequent sales of the article may be made. The patentee relies solely upon the notice quoted to control future prices in the resale by a purchaser of an article said to be of great utility and highly desirable for general use. [17] The appellee and the jobbers from whom he purchased were neither the agents nor the licensees of the patentee. They had the title to, and the right to sell, the article purchased without accounting for the proceeds to the patentee and without making any further payment than had already been made in the purchase from the agent of the patentee. Upon such facts as are now presented we think the right to *vend* secured in the patent statute is not distinguishable from the right of *vending* given in the copyright act. In both instances it was the intention of Congress to secure an exclusive right to sell, and there is no grant of a privilege to keep up prices and prevent competition by notices restricting the price at which the article may be resold. The right to vend conferred by the patent law has been exercised, and the added restriction is beyond the protection and purpose of the act. This being so, the case is brought within that line of cases in which this court from the beginning has held that a patentee who has parted with a patented machine by passing title to a purchaser has placed the article beyond the limits of the monopoly secured by the patent act.

In *Adams* v. *Burke*, 17 Wall. 453, Mr. Justice Miller, delivering the opinion of the court, pertinently said (p. 455):

"The vast pecuniary results involved in such cases, as well as the public interest, admonish us to proceed with care, and to decide in each case no more than what is directly in issue. . . .

"The true ground on which these decisions rest is that the sale by a person who has the full right to make, sell, and use such a machine carries with it the right to the use of that machine to the full extent to which it can be used in point of time.

"The right to manufacture, the right to sell, and the right to use are each substantive rights, and may be granted or conferred separately by the patentee.

Syllabus.

[18] "But, in the essential nature of things, when the patentee, or the person having his rights, sells a machine or instrument whose sole value is in its use, he receives the consideration for its use and he parts with the right to restrict that use. The article, in the language of the court, passes without the limit of the monopoly. That is to say, the patentee or his assignee having in the act of sale received all the royalty or consideration which he claims for the use of his invention in that particular machine or instrument, it is open to the use of the purchaser without further restriction on account of the monopoly of the patentees."

Bloomer v. *McQuewan*, *supra; Goodyear* v. *Beverly Rubber Co.*, 1 Cliff. 348, 354, 10 Fed. Cases, 638; *Chaffee* v. *Boston Belting Co.*, 22 How. 217, 223; *Keeler* v. *Standard Folding Bed Co.*, 157 U. S. 659.

Holding these views, the question propounded by the Court of Appeals will be answered in the negative, and

It is so ordered.

Dissenting: Mr. Justice McKenna, Mr. Justice Holmes, Mr. Justice Lurton, and Mr. Justice Van Devanter.

STRAUS ET AL., COMPOSING THE FIRM OF R. H. MACY & COMPANY, *v.* VICTOR TALKING MACHINE COMPANY.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 374. Argued January 12, 1917.—Decided April 9, 1917.

[243 U. S. 490.]

The monopoly of use granted by the patent law can not be made a means of controlling the prices of the patented articles after they have been in reality, even though not in form, sold and paid for.[a]

An attempt by means of "license contracts" with dealers and "license notices" attached to patented machines to retain title in the manufacturer and patent owner until the expiration of the latest patent referred to in such notice, and to limit until the expiration of such period the right of the public to a mere license to use dependent upon observance of conditions in the "license notices," including conditions as to price, will not be regarded as a legitimate exercise of the patent owner's control over the use where, plainly, from the

terms of the "license notices" and from the relations established between the patent owner and the dealers through whom the machines are distributed, the object of such reservations and restrictions is to enable the patent owner to fix and maintain the prices at which the machines may be disposed of after they have passed from its possession into the possession of the dealers and the public and after it has received from the dealers the full price which it asks or expects for the machines.

In such case, as to purchasers not in privity with the patent owner, the restrictions of the "license notices" are to be treated as void attempts to control prices after sale, and, in buying from the dealers and reselling to the public at prices lower than the notices prescribe, such purchasers do not violate the rights secured to the patent owner by the patent law.

230 Fed. Rep. 449, reversed.

The case is stated in the opinion.

Mr. Edmond E. Wise and *Mr. Walter C. Noyes* for petitioners.

[491] *Mr. Hector T. Fenton*, with whom *Mr. Frederick A. Blount* was on the brief, for respondent:

The manner by which the plaintiff obtains the benefit of its patent is by delivering the physical thing, accompanied by a specifically limited use license affixed thereto, on payment by the licensee of a certain initial or cash royalty as a *sine qua non* to the passing of any title or right of possession or use. The licensee thus obtains a qualified title only in the physical thing with a specific and limited license to use under the patents. He acquires possession with full knowledge of the limitations. The paramount license between plaintiff and its distributors passes no title or authority save to act as intermediaries of the plaintiff in delivery of machine or record, and of the specific license for and attached to each machine or record so delivered, to the user. The specific license controlling the title and permitted use is between the plaintiff and the user. A privity of relation between them is created when the intended licensee by paying the initial royalty gains lawful possession of the machine with the license right given therewith, because such license affixed to the machine or record, issuing directly from, signed

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by, and as the act of the plaintiff, and the acceptance of the machine or record, with such license specific to and affixed to it, and with full knowledge of its terms and limitations, creates such privity of relation.

Defendants, having covertly obtained possession of the physical thing and the limited license to use, without having paid the full initial cash portion of the consideration required by the terms of the license as a condition precedent, acquired no lawful right of possession or limited right to use. The injury to plaintiff in destroying its market and its standard royalty rates for its machines and records by their reselling at even lower rates, is merely an incident in aggravation of the tort of infringing its patents. The action is *ex delicto* and jurisdiction of [492] the federal courts exists. *Fair* v. *Kohler Die Co.*, 228 U. S. 22; *Healy* v. *Sea Gull Co.*, 237 U. S. 479, 480; *Geneva Furniture Co.* v. *Karpen*, 238 U. S. 254, 260; *Henry* v. *Dick Co.*, 224 U. S. 1.

The Anti-Trust Acts have no applicability. *Standard Sanitary Co.* v. *United States*, 226 U. S. 20, 39–40.

The defendants had full knowledge of the license restrictions and of the portion of the patent monopoly reserved. *Henry* v. *Dick Co.*, *supra; Wood* v. *Carpenter*, 101 U. S. 135, 142; *Shauer* v. *Alterton*, 151 U. S. 607, 622; *American Cotton Tie Co.* v. *Bullard*, 4 Ban. & A. 520.

To qualify the exclusive rights granted by the patent law is to deprive the patentee unjustly of part of the consideration for which he parted with his disclosure. Under the patent laws the patentee may maintain a close monopoly of the rights granted or separately exercise the distinct rights to make, to use, and to sell. He may limit a license to use for specific purposes only, may charge what he thinks proper for permitting invasion of his monopoly, and may contract for his consideration either in money, or by way of conditions on the use, or both. He may impose any conditions "not definitely illegal." *Bement* v. *Harrow Co.*, 186 U. S. 70, 91; *Bauer* v. *O'Donnell*, 229 U. S. 1. The distinction is plain between the property right in the materials composing a machine or the machine as a physical thing, and the right to use it for the purpose and in the manner pointed out by

Argument for Respondent.

the patent. *Henry* v. *Dick Co., supra.* The rights to make, sell, and use are each substantive, distinct rights, and may be granted or conferred separately by the patentee. *Bauer* v. *ODonnell, supra.* Any invasion of a reserved control over the use is an invasion of the patent. Cases last cited.

The law relating to attempted conditions on resale of unpatented chattels (*Miles Medical Co.* v. *Park*, 220 U. S. 375, 401) has no bearing, nor has the question whether [493] the transaction amounts to a conditional sale at common law. For there is no "absolute and unconditional sale which operates to pass the patented thing outside the boundaries of the patent," or indeed any sale at all. Plainly the license restrictions qualify not only the right to use but also the otherwise unlimited title to and right of possession in the machine considered as the physical embodiment of the invention patented and licensed as distinguished from the materials composing it. There is no unconditional passing of the title. *Henry* v. *Dick Co., supra.* Indeed, there is no sale whatever, and the defendants having never acquired either title or right of possession, can not set up the license affixed to the machine in justification of their infringement.

The decision in the *Dick case* properly holds that the patented article sold by a patentee with a condition as to use exemplifies two severable rights of property, one arising under the common law, to the physical thing as such, and the other an incorporeal property right in it as the embodiment of a patented invention the exclusive right to use which belongs to the *same* owner. Hence a sale of the physical thing with a qualification of the right to use it, by a patentee or licensee possessing *both* rights of property, operates not alone as an exercise of the right "to use," conferred by the patent grant, but, in the very nature of things, operates to qualify the title and free right of disposition, of the physical thing which is an exemplification or embodiment of the *invention* so *specifically* licensed. If the transaction be such that, to use the language of Judge Lowell in *Porter Needle Co.* v. *National Needle Co.*, 17 Fed. Rep. 536, it is clear "the patentee has chosen to dissever the ownership and right of use, and that his intent is not doubtful," then (as found by

the majority opinion in the *Dick case*) it was "the kind of limitation which may lawfully be imposed (by a patentee) upon a purchaser" of his patented machine; and a "law-
[494] ful qualification" upon the use thereof, binding upon the licensee and his assigns with notice.

There is no conflict between the *Dick case* and *Bauer* v. *O'Donnell*. The ground of dissent in the former had to do with the confining of the use of the machine to materials wholly unpatented. In this case both machines and records are the subject of independent patents. In the *Bauer case* the patented articles were absolutely sold and an attempt made to limit resale. In the opinion it is so distinguished from the *Dick case*.

Mr. Elisha K. Camp, *Mr. Daniel N. Kirby*, and *Mr. Taylor E. Brown*, by leave of court, filed a brief on behalf of the American Graphophone Company and the Columbia Graphophone Company, as *amici curiæ*.

Mr. Justice CLARKE delivered the opinion of the court.

It will contribute to brevity to designate the parties to this proceeding as they were in the trial court—the respondent as plaintiff and the petitioners as defendants.

The plaintiff in its bill alleges: That it is a corporation of New Jersey; that for many years it has been manufacturing sound-reproducing machines embodying various features covered by patents of which it is the owner, and that, for the purpose of marketing these machines to the best advantage, about August 1, 1913, it adopted a form of contract which it calls a "license contract" and a form of notice called a "license notice," under which is alleges all of its machines have, since that date, been furnished to dealers and to the public.

This "License Notice," which is attached to each machine and is set out in full in the bill, declares that the machine to which it is attached is manufactured under patents, is licensed for the term of the patent under which it is licensed having the longest time to run, and may be [495]
used only with sound records, sound boxes, and needles man-

ufactured by the plaintiff; that only the right to use the machine "for demonstrating purposes" is granted to "distributors" (wholesale dealers), but that these "distributors" may assign a like right "to the public" or to "regularly licensed Victor dealers" (retailers) "at the dealers' regular discount royalty"; that the "dealers" may convey the "license to use the machine" only when a "royalty" of not less than $200 shall have been paid, and upon the "consideration" that all of the conditions of the "license" shall have been observed; that the title to the machine shall remain in the plaintiff, which shall have the right to repossess it upon breach of any of the conditions of the notice, by paying to the user the amount paid by him less 5 per cent for each year that the machine has been used. The notice in terms reserves the right to the plaintiff to inspect, adjust, and repair the machine at all times and to instruct the user in its use, "but assumes no obligation so to do"; it provides that "any excess use, or violation of the conditions, will be an infringement of the said patents," and that any erasure or removal of the notice will be considered as a violation of the license. Finally, it provides that at the expiration of the patent "under which it is licensed" having the longest time to run the machine shall become the property of the licensee, provided all the conditions recited in the notice shall have been complied with and the acceptance of the machine is declared to be "an acceptance of these conditions."

The contract between the plaintiff and its dealers is not set out in full in the bill, but it is alleged that since August 1, 1913, the plaintiff has had with each of its 7,000 licensed dealers a written contract in which all the terms of the "License Notice" are in substance repeated, and in addition it is alleged that each dealer "if he has signed the assent thereto" is authorized to dispose of any machines received from "the plaintiff either directly or through a [496] paramount distributing dealer," but subject to all of the conditions expressed in the "License Notice." It is alleged that this contract contains the provision that "a breach of any of the conditions on the part of the distributor will render

him also liable, not only for infringement of the patents but for an action on the contract or other proper remedy."

As to the defendants the bill alleges that they conduct a large mercantile business in New York City; that with full knowledge of the terms of the contract, as described, between the plaintiff and its distributors and of the "License Notice" attached to each machine, the defendants "being members of the general unlicensed public," and having no contract relation with the plaintiff or with any of its licensed distributors or licensed dealers, induced "covertly and on various pretenses" one or more of plaintiff's licensed distributors or dealers to violate his or their contracts with the plaintiff, providing that no machines should be delivered to any unlicensed member of the general public until "the full license price" stated in the "License Notice" affixed to each machine was paid, and thereby obtained possession of a large number of such machines at much less than the prices stated in the "License Notice"; that under the terms of the said license agreement and notice, they have no title to the same, and that they have sold large numbers thereof to the public and are proposing and threatening to dispose of the remainder of those which they have acquired to "the unlicensed general public," at much less than the price stated in the notice affixed to each machine.

The prayer is for an injunction restraining the defendants from selling any of the machines, possession of which they have acquired, from other and further violation of plaintiff's rights under its letters patent and for the usual accounting and for damages.

The District Court regarded the transaction described [497] in the "License Notice" as in substance a sale which exhausted the interest of the plaintiff in the machine, except as to the right to have it used with records and needles as provided for therein, and this right not being involved in this case it dismissed the bill. 222 Fed. Rep. 524.

On appeal, the Circuit Court of Appeals affirmed this judgment and remanded the case, but with instructions to allow the plaintiff to amend its bill "if it be so advised." 225 Fed. Rep. 535.

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The bill was thereafter so amended as to allege that the defendants had in their possession a large number of machines which they had obtained from plaintiff's distributors and dealers at much less in each case than the price stated in the "License Notice," and that they were proposing to dispose of these machines to the "unlicensed general public" at less than the prices stated in the "License Notice," in disregard of plaintiff's rights.

Again the District Court, on the same ground as before, sustained a motion to dismiss the bill, but the Circuit Court of Appeals reversed this holding (230 Fed. Rep. 499) and the case is here for review on certiorari.

The abstract of the bill which we have given, makes it plain: That whatever rights the plaintiff has against the defendants must be derived from the "License Notice" attached to each machine, for no contract rights existed between them, the defendants being only "members of the unlicensed general public;" and that the sole act of infringement charged against the defendants is that they exceeded the terms of the license notice by obtaining machines from the plaintiff's wholesale or retail agents and by selling them at less than the price fixed by the plaintiff.

It is apparent from the foregoing statement that we are called upon to determine whether the system adopted by the plaintiff was selected as a means of securing to the owner of the patent that exclusive right to use its invention which is granted through the patent law, or whether, [498] under color of such a purpose, it is a device unlawfully resorted to in an effort to profitably extend the scope of its patent at the expense of the general public. Is it the fact, as is claimed, that this "License Notice" of the plaintiff is a means or agency designed in candor and good faith to enable the plaintiff to make only that full, reasonable, and exclusive use of its invention which is contemplated by the patent law or is it a disguised attempt to control the prices of its machines after they have been sold and paid for?

First of all it is plainly apparent that this plan of marketing adopted by the plaintiff is, in substance, the one dealt with by this court in *Dr. Miles Medical Co.* v. *Park & Sons*

Co., 220 U. S. 373, and in *Bauer* v. *O'Donnell*, 229 U. S. 1, adroitly modified on the one hand to take advantage, if possible, of distinctions suggested by these decisions, and on the other hand to evade certain supposed effects of them.

If we look through the words and forms, with which the plaintiff has most elaborately enveloped its purpose, to the substance and realities of the transaction contemplated, we shall discover several notable and significant features. First, while as if looking to the future, the notice, in terms, imposes various restrictions as to title and as to the "use" of the machines by plaintiff's agents, wholesale, and retail, and by the "unlicensed members of the public," for itself, the plaintiff makes sure, that the future shall have no risks, for it requires that all that it asks or expects at any time to receive for each machine must be paid in full before it parts with the possession of it.

Second, while in terms the "use" of each machine is restricted and forfeiture for failure to strictly comply with the many conditions and requirements of the notice is provided for, this system, elaborate to the extent of confusion, fails utterly to provide for entering any evidence of a qualified title in any public office or in any public [499] record, and no requirement is found in it for reporting by users or licensees, who may remove from one place to another taking the machine with them, as would very certainly be required if the plaintiff intended to enforce the rights so elaborately asserted in this notice—if the system were really a genuine provision designed to protect through many years to come the restricted right to "use" and the seemingly qualified title which it purports to grant to dealers and to the public, from being exceeded or departed from.

Third. The fact that under this system "at different times" "large numbers" of machines, as is alleged in the plaintiff's bill, have been "covertly" sold to the defendants by the plaintiff's wholesale and retail agents at less than the price fixed for them, is persuasive evidence that the transaction is not what it purports on its face to be. If it were a reasonably guarded plan, really intended to keep the plaintiff in touch with each of its machines until the expiration of

the patent of latest date, for the purpose of insisting upon its being used in the manner provided for in the "License Notice" the plaintiff's prompt and sufficient remedy for such an invasion of its rights as is claimed in this case would be found in its sales department or rather in its "license" department, and not in the courts. That the plaintiff comes into court with a bill to enjoin the defendants from reselling machines secretly sold to them in large numbers by the plaintiff's agents indicates very clearly that at least until the exigency out of which this case grew, arose, the scheme was regarded by the plaintiff itself and by its agents simply as one for maintaining prices by holding a patent infringement suit *in terrorem* over the ignorant and the timid.

And, finally, while the notice permits the use of the machines, which have been fully paid for, by the "unlicensed members of the general public," significantly called in the bill "the ultimate users," until "the expira [500] tion of the patent having the longest term to run" (which, under the copy of the notice set out in the bill, would be July 22, 1930) it provides that if the licensee shall not have failed to observe the conditions of the license, and the Victor Company shall not have previously taken possession of the machine, as in the notice provided, then, perhaps sixteen years or more after he has paid for it and in all probability long after it has been worn out or become obsolete and worthless "it shall become the property of the licensee."

It thus becomes clear that this "License Notice" is not intended as a security for any further payment upon the machine, for the full price, called a "royalty," was paid before the plaintiff parted with the possession of it; that it is not to be used as a basis for tracing and keeping the plaintiff informed as to the condition or use of the machine, for no report of any character is required from the "ultimate user" after he has paid the stipulated price; that, notwithstanding its apparently studied avoidance of the use of the word "sale" and its frequent reference to the word "use," the most obvious requirements for securing a *bona fide* enforcement of the restrictions of the notice as to "use" are omitted; and that, even by its own terms, the title to the

machines ultimately vests in the "ultimate users," without further payment or action on their part, except patiently waiting for patents to expire on inventions, which, so far as this notice shows, may or may not be incorporated in the machine. There remains for this "License Notice" so far as we can discover, the function only, of fixing and maintaining the price of plaintiff's machines to its agents and to the public, and this we can not doubt is the purpose for which it really was designed.

Courts would be perversely blind if they failed to look through such an attempt as this "License Notice" thus plainly is to sell property for a full price, and yet to place [501] restraints upon its further alienation, such as have been hateful to the law from Lord Coke's day to ours, because obnoxious to the public interest. The scheme of distribution is not a system designed to secure to the plaintiff and to the public a reasonable use of its machines, within the grant of the patent laws, but is in substance and in fact a mere price-fixing enterprise, which, if given effect, would work great and widespread injustice to innocent purchasers, for it must be recognized that not one purchaser in many would read such a notice, and that not one in a much greater number, if he did read it, could understand its involved and intricate phraseology, which bears many evidences of being framed to conceal rather than to make clear its real meaning and purpose. It would be a perversion of terms to call the transaction intended to be embodied in this system of marketing plaintiff's machines a "license to use the invention." *Bauer* v. *O'Donnell*, 229 U. S. 1, 16.

Convinced as we are that the purpose and effect of this "License Notice" of plaintiff, considered as a part of its scheme for marketing its product, is not to secure to the plaintiff any use of its machines, and as is contemplated by the patent statutes, but that its real and poorly concealed purpose is to restrict the price of them, after the plaintiff had been paid for them and after they have passed into the possession of dealers and of the public, we conclude that it falls within the principles of *Adams* v. *Burke*, 17 Wall. 453, 456; and of *Bauer* v. *O'Donnell*, 229 U. S. 1; that it is, there-

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fore, invalid, and that the District Court properly held that the bill must fail for want of equity.

It results that the decree of the Circuit Court of Appeals will be reversed and that of the District Court affirmed.

Reversed.

Dissenting: Mr. Justice McKENNA, Mr. Justice HOLMES and Mr. Justice VAN DEVANTER.

MOTION PICTURE PATENTS COMPANY *v.* UNIVERSAL FILM MANUFACTURING COMPANY ET AL.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 715. Argued January 12, 15, 1917.—Decided April 9, 1917.

[243 U. S., 502.]

Under the patent law the grant by patent of the exclusive right to use, like the grant of the exclusive right to vend, is limited to the invention described in the claims of the patent, and that law does not empower the patent owner by notices attached to the things patented to extend the scope of the patent monopoly by restricting their use to materials necessary for their operation but forming no part of the patented invention, or to send such articles forth into the channels of trade subject to conditions as to use or royalty, to be imposed thereafter, in the vendor's discretion. *The Button-Fastener case*,[a] 77 Fed. Rep. 288, and *Henry* v. *Dick Company*, 224 U. S. 1, overruled.

In determining how far the owner of a patent may restrict the use after sale of machines embodying the invention, weight must be given to the rules long established that the scope of every patent is limited to the invention as described in the claims, read in the light of the specification, that the patentee receives nothing from the patent law beyond the right to restrain others from manufacturing, using, or selling his invention, and that the primary purpose of that law is not to create private fortunes but is to promote the progress of science and the useful arts.

The extent to which the use of a patented machine may validly be restricted to specific supplies or otherwise by special contract between the owner of the patent and a purchaser or licensee, is a question outside of the patent law and not involved in this case.

235 Fed. Rep. 398, affirmed.

Argument for Petitioner.

THE case is stated in the opinion.

Mr. Melville Church for petitioner:

The restrictions on the right to use the machine were fully brought home to the Prague Amusement Company [503] and were binding. This is settled by *Henry* v. *Dick Co.*, 224 U. S. 1, and no doubt is cast upon that case by *Bauer* v. *O'Donnell*, 229 U. S. 1, which did not involve the right to impose restrictions on use.

In the present case there were two distinct restrictions: First, that the machine should be used only with motion pictures leased from a manufacturer licensed by the plaintiff; and second, that the machine could not be used at all without compliance with terms previously fixed by the plaintiff. The first restriction is not repugnant to the Clayton Act of October 15, 1914, § 3, 38 Stat. 730; but even if it were, the lawfulness of the second restriction, which the Prague Company admittedly violated if it had notice, would not be affected. *Oregon Steam Nav. Co.* v. *Winsor*, 20 Wall. 64–72; *U. S. &c. Co.* v. *Griffen*, 126 Fed. Rep. 364–370. The two are independent and severable and the latter will support the plaintiff's right to exact a license agreement providing for a continuing royalty, which it might lawfully reserve and rely upon. *St. Paul Plow Works* v. *Sparling*, 140 U. S. 184. The $5.00 received from the licensed manufacturer was but a paltry 3½ per cent of the selling price, and utterly inadequate. The name plate gave notice of the facts in relation to patent ownership and that restrictions were placed by the plaintiff upon the use. The Prague Company was under a duty to inquire of the Precision Machine Company the terms of the license under which the machine was put out, or to make like inquiry of the plaintiff. Inquiry of the former would have shown that the Precision Company was inhibited from selling except for use "upon other terms" to be fixed by the licensor and relating to the payment of royalty. The same information would have been obtained by inquiry of plaintiff. Either line of inquiry, properly followed up (*Shauer* v. *Alterton*, 151 U. S. 607–622; *Wood* v. *Carpenter*, 101 U. S. 135–141), would have revealed the details of these "other terms" and

resulted in the fixing of a royalty [504] for use, to be paid only during use—a most reasonable arrangement.

Having failed to arrange for terms of royalty with the petitioner, the Prague Amusement Company never had a license to use and was and is, therefore, an infringer while using.

The distinction between the property rights conferred by patent and property rights in the machine, must be borne clearly in mind. The former are incorporeal, the latter corporeal, personal property. *De La Vergne Machine Co.* v. *Featherstone*, 147 U. S. 209–222. Under the patent laws, R. S. § 4898, the incorporeal rights are susceptible of infinite sub-division without impairment. Besides assignments and grants, the separate substantive, exclusive, privileges of making, using, and selling may be parceled out by licenses with a wide variety of choice and combination as to time, place, method. Any such license may be granted for a lump sum or upon agreement for a continuing royalty. The patent owner can neither be required to make, use, or sell, nor to license others to do so. *Paper Bag Patent Case*, 210 U. S. 405, 425, 429. Upon a sale of the thing patented there is a transfer of the property in the thing itself, but of only so much of the incorporeal patent rights as the owner chooses to relinquish. A sale outright without restriction passes both kinds of rights absolutely, but if, when selling, the patent owner restricts the purchaser's enjoyment of the incorporeal right of use conferred by the patent, any use by the purchaser beyond what is specifically authorized is an infringement upon the patent owner's reserved rights and may be restrained by the courts.

In the present case the machine proclaimed through the notice upon it that the right to use was restricted, and notified the purchaser to go to the plaintiff and make terms for the use, else it would be unlawful.

It is no objection that the notice itself did not state [505] the terms. Plainly and unmistakably it showed that the machine was not free, but under the domination of the named patent owner, who must be applied to. If the notice had been followed up, a reasonable royalty contract would have undoubtedly resulted. In ignoring the notice out of a desire

to escape any royalty, the purchaser took its chances of being stopped for infringement.

There is no question but that plaintiff's remedy is on the patent for the tort. There was no contract. Respondent, having deliberately refused to make one, is estopped to claim a contract or that the plaintiff has mistaken its remedy.

The liability of the other respondents is that of contributory infringers who knowingly coöperated in carrying on an unlicensed use. All the respondents are jointly and severally liable in tort. *Lovejoy* v. *Murray*, 3 Wall. 1–11; Walker on Patents, 4th ed., § 406, p. 343.

The patent in suit is valid. Plaintiff is not estopped, as claimed, by proceedings in the Patent Office.

Mr. Oscar W. Jeffery, with whom *Mr. Edmund Wetmore* and *Mr. John B. Stanchfield* were on the brief, for respondents.

Mr. Justice CLARKE delivered the opinion of the court.

In this suit relief is sought against three defendant corporations as joint infringers of claim number seven of United States letters patent No. 707,934, granted to Woodville Latham, assignor, on August 26, 1902, for improvements in Projecting-Kinetoscopes. It is sufficient description of the patent to say that it covers a part of the mechanism used in motion picture exhibiting machines for feeding a film through the machine with a regular, uniform, and accurate movement and so as not to expose the film to excessive strain or wear.

The defendants in a joint answer do not dispute the title [506] of the plaintiff to the patent, but they deny the validity of it, deny infringement, and claim an implied license to use the patented machine.

Evidence which is undisputed shows that the plaintiff on June 20, 1912, in a paper styled "License Agreement" granted to The Precision Machine Company a right and license to manufacture and sell machines embodying the inventions described and claimed in the patent in suit, and in other patents, throughout the United States, its territories

and possessions. This agreement contains a covenant on the part of the grantee that every machine sold by it, except those for export, shall be sold "under the restriction and condition that such exhibiting or projecting machines shall be used solely for exhibiting or projecting motion pictures containing the inventions of reissued letters patent No. 12,192, *leased by a licensee of the licensor while it owns said patents, and upon other terms to be fixed* by the licensor and complied with by the user while the said machine is in use and *while the licensor owns said patents* (which other terms shall only be the payment of a royalty or rental to the licensor while in use)."

The grantee further covenants and agrees that to each machine sold by it, except for export, it will attach a plate showing plainly not only the dates of the letters patent under which the machine is "licensed," but also the following words and figures:

"Serial No. ———.

"Patented No.

"The sale and purchase of this machine gives only the right to use it solely with moving pictures containing the invention of reissued patent No. 12,192, leased by a licensee of the Motion Picture Patents Company, the owner of the above patents and reissued patent, while it owns said patents, and upon other terms to be fixed by the Motion Picture Patents Company and complied with by the user while it is in use and while the Motion Picture [507] Patents Company owns said patents. The removal or defacement of this plate terminates the right to use this machine."

The agreement further provides that the grantee shall not sell any machine at less than the plaintiff's list price, except to jobbers and others for purposes of resale and that it will require such jobbers and others to sell at not less than plaintiff's list price. The price fixed in the license contract for sale of machines after May 1, 1909, is not less than $150 for each machine and the licensee agrees to pay a royalty of $5 on some machines and a percentage of the selling price on others.

It is admitted that the machine, the use of which is charged to be an infringement of the patent in suit, was manufactured by The Precision Machine Company and was sold and delivered under its "License Agreement" to the

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Seventy-second Street Amusement Company, then operating a playhouse on Seventy-second Street, in New York, and that when sold it was fully paid for and had attached to it a plate with the inscription which we have quoted as required by the agreement.

Reissued patent 12,192, referred to in the notice attached to the machine, expired on August 31, 1914. The defendant Prague Amusement Company on November 2, 1914, leased the Seventy-second Street playhouse from the Seventy-second Street Amusement Company, and acquired the alleged infringing machine as a part of the equipment of the leased playhouse. Subsequent to the expiration of reissued patent 12,192 the defendant, Universal Film Manufacturing Company, made two films or reels, which, between March 4 and 17, 1915, were sold to the defendant the Universal Film Exchange and on March 17, 1915, were supplied to the defendant Prague Amusement Company for use on the machine, acquired as we have stated, and were used upon it at the Seventy-second Street playhouse on March 18, 1915.

[508] On January 18, 1915, the plaintiff sent a letter to the Seventy-second Street Amusement Company, notifying it in general terms that it was using without a license a machine embodying the invention of patent No. 707,934 and warning it that such use constituted an infringement of the patent, and on the same day the plaintiff addressed a letter to the defendant Universal Film Exchange notifying it that it also was infringing the same patents by supplying films for use upon the machine of the Seventy-second Street playhouse and elsewhere. The bill in this case was filed on March 18, 1915.

The District Court held that the limitation on the use of the machine attempted to be made by the notice attached to it, after it had been sold and paid for, was invalid, and that the Seventy-second Street Amusement Company, the purchaser, and its lessee, the Prague Amusement Company, had an implied license to use the machine as it had been used, and it dismissed the bill without passing on the question raised in the pleadings as to the validity of the patent. The Circuit Court of Appeals affirmed the District Court (235 Fed. Rep. 398) and the case is here for review on certiorari.

It was admitted at the bar that 40,000 of the plaintiff's machines are now in use in this country and that the mechanism covered by the patent in suit is the only one with which motion picture films can be used successfully.

This state of facts presents two questions for decision:

First. May a patentee or his assignee license another to manufacture and sell a patented machine and by a mere notice attached to it limit its use by the purchaser or by the purchaser's lessee, to films which are no part of the patented machine, and which are not patented?

Second. May the assignee of a patent, which has licensed another to make and sell the machine covered by it, by a mere notice attached to such machine, limit the [509] use of it by the purchaser or by the purchaser's lessee to terms not stated in the notice but which are to be fixed, after sale, by such assignee in its discretion?

It is obvious that in this case we have presented anew the inquiry, which is arising with increasing frequency in recent years, as to the extent to which a patentee or his assignee is authorized by our patent laws to prescribe by notice attached to a patented machine the conditions of its use and the supplies which must be used in the operation of it, under pain of infringement of the patent.

The statutes relating to patents do not provide for any such notice, and it can derive no aid from them. Revised Statutes, § 4900, requiring that patented articles shall be marked with the word "Patented," affects only the damages recoverable for infringement, *Dunlap* v. *Schofield*, 152 U. S. 244, and Rev. Stats., § 4901, protects by its penalties the inventor, but neither one contemplates the use of such a "license notice" as we have here, and whatever validity it has must be derived from the general and not from the patent law.

The extent to which the use of the patented machine may validly be restricted to specific supplies or otherwise by special contract between the owner of a patent and the purchaser or licensee is a question outside the patent law, and with it we are not here concerned. *Keeler* v. *Standard Folding Bed Co.*, 157 U. S. 659.

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The inquiry presented by this record, as we have stated it, is important and fundamental, and it requires that we shall determine the meaning of Congress when in Rev. Stats., §4884, it provided that "Every patent shall contain * * * a grant to the patentee, his heirs or assigns, for the term of seventeen years, *of the exclusive right to* make, *use*, and vend *the invention or discovery* throughout the United States and the Territories thereof." We are concerned only with the right to "use," authorized to be granted by this statute, for it is under warrant of this [510] right only that the plaintiff can and does claim validity for its warning notice.

The words used in the statute are few, simple, and familiar; they have not been changed substantially since they were first used in the Act of 1790, c. 7, 1 Stat. 109; *Bauer* v. *O'Donnell*, 229 U. S. 1, 9; and their meaning would seem not to be doubtful if we can avoid reading into them that which they really do not contain.

In interpreting this language of the statute it wil be of service to keep in mind three rules long established by this court, applicable to the patent law and to the construction of patents, viz:

First. The scope of every patent is limited to the invention described in the claims contained in it, read in the light of the specification. These so mark where the progress claimed by the patent begins and where it ends that they have been aptly likened to the description in a deed, which sets the bounds to the grant which it contains. It is to the claims of every patent, therefore, that we must turn when we are seeking to determine what the invention is, the exclusive use of which is given to the inventor by the grant provided for by the statute—"He can claim nothing beyond them." *Keystone Bridge Co.* v. *Phœnix Iron Co.*, 95 U. S. 274; *Railroad Co.* v. *Mellon*, 104 U. S. 112, 118; *Yale Lock Mfg. Co.* v. *Greenleaf*, 117 U. S. 554, 559; *McClain* v. *Ortmayer*, 141 U. S. 419, 424.

Second. It has long been settled that the patentee receives nothing from the law which he did not have before, and that the only effect of his patent is to restrain others from manufacturing, using, or selling that which he has invented. The patent law simply protects him in the monopoly of that

which he has invented and has described in the claims of his patent. *United States* v. *American Bell Telephone Co.*, 167 U. S. 224, 239; *Paper Bag Patent Case*, 210 U. S. 405, 424; *Bauer* v. *O'Donnell*, 229 U. S. 1, 10.

Third. Since *Pennock* v. *Dialogue*, 2 Pet. 1, was decided in [511] 1829 this court has consistently held that the primary purpose of our patent laws is not the creation of private fortunes for the owners of patents but is "to promote the progress of science and useful arts" (Constitution, Art. I, § 8), an object and purpose authoritatively expressed by Mr. Justice Story, in that decision, saying:

"While one great object [of our patent laws] was, by holding out a reasonable reward to inventors and giving them an exclusive right to their inventions for a limited period, to stimulate the efforts of genius, the main object was 'to promote the progress of science and useful arts.'"

Thirty years later this court, returning to the subject, in *Kendall* v. *Winsor*, 21 How. 322, again pointedly and significantly says:

"It is undeniably true that the limited and temporary monopoly granted to inventors was never designed for their exclusive profit or advantage; the benefit to the public or community at large was another and doubtless the primary object in granting and securing that monopoly."

This court has never modified this statement of the relative importance of the public and private interests involved in every grant of a patent, even while declaring that in the construction of patents and the patent laws inventors shall be fairly, even liberally, treated. *Grant* v. *Raymond*, 6 Pet. 218, 241; *Winans* v. *Denmead*, 15 How. 330; Walker on Patents, § 185.

These rules of law make it very clear that the scope of the grant which may be made to an inventor in a patent, pursuant to the statute, must be limited to the invention described in the claims of his patent (104 U. S. 118, *supra*), and to determine what grant may lawfully be so made we must hold fast to the language of the act of Congress providing for it, which is found in two sections of the Revised Statutes. Section 4886 provides that "Any person who has invented or discovered any new and useful art, ma[512]chine, manufacture, or composition of matter, or any new and useful

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improvement thereof, * * * may * * * obtain a patent therefor"; and § 4884 provides that such patent when obtained "shall contain * * * a grant to the patentee, his heirs or assigns * * * of the exclusive right to * * * use * * * the invention or discovery."

Thus the inventor may apply for, and, if he meets the required conditions, may obtain, a patent for the new and useful invention which he has discovered, which patent shall contain a grant of the right to the exclusive use of his discovery.

Plainly, this language of the statute and the established rules to which we have referred restrict the patent granted on a machine, such as we have in this case, to the mechanism described in the patent as necessary to produce the described results. It is not concerned with and has nothing to do with the materials with which or on which the machine operates. The grant is of the exclusive right to use the mechanism to produce the result with any appropriate material, and the materials with which the machine is operated are no part of the patented machine or of the combination which produces the patented result. The difference is clear and vital between the exclusive right to use the machine which the law gives to the inventor and the right to use it exclusively with prescribed materials to which such a license notice as we have here seeks to restrict it. The restrictions of the law relate to the useful and novel features of the machine which are described in the claims of the patent, they have nothing to do with the materials used in the operation of the machine; while the notice restrictions have nothing to do with the invention which is patented, but relate wholly to the materials to be used with it. Both in form and in substance the notice attempts a restriction upon the use of the supplies only, and it cannot with any regard to pro[513]priety in the use of language be termed a restriction upon the use of the machine itself.

Whatever right the owner may have to control by restriction the materials to be used in operating the machine must be derived through the general law from the ownership of the property in the machine, and it can not be derived from or protected by the patent law, which allows a grant only

of the right to an exclusive use of the new and useful discovery which has been made—this and nothing more.

This construction gives to the inventor the exclusive use of just what his inventive genius has discovered. It is all that the statute provides shall be given to him and it is all that he should receive, for it is the fair as well as the statutory measure of his reward for his contribution to the public stock of knowledge. If his discovery is an important one, his reward under such a construction of the law will be large, as experience has abundantly proved, and if it be unimportant he should not be permitted by legal devices to impose an unjust charge upon the public in return for the use of it. For more than a century this plain meaning of the statute was accepted as its technical meaning, and that it afforded ample incentive to exertion by inventive genius is proved by the fact that under it the greatest inventions of our time, teeming with inventions, were made. It would serve no good purpose to amplify by argument or illustration this plain meaning of the statute. It is so plain that to argue it would obscure it.

It was not until the time came in which the full possibilities seem first to have been appreciated of uniting, in one, many branches of business through corporate organization and of gathering great profits in small payments, which are not realized or resented, from many, rather than smaller or even equal profits in larger payments, which are felt and may be refused, from a few, that it came to be thought that the "right to use * * * the invention" [514] of a patent gave to the patentee or his assigns the right to restrict the use of it to materials or supplies not described in the patent and not by its terms made a part of the thing patented.

The construction of the patent law which justifies as valid the restriction of patented machines, by notice, to use with unpatented supplies necessary in the operation of them, but which are no part of them, is believed to have originated in *Heaton-Peninsular Button-Fastener Co.* v. *Eureka Specialty Co.*, 77 Fed. Rep. 288 (which has come to be widely referred to as the *Button-Fastener Case*), decided by the Circuit Court of Appeals of the Sixth Circuit in 1896. In

this case the court, recognizing the pioneer character of the decision it was rendering, speaks of the "novel restrictions" which it is considering and says that it is called upon "to mark another boundary line around the patentee's monopoly, which will *debar him from engrossing the market for an article not the subject of a patent*," which it declined to do.

This decision proceeds upon the argument that, since the patentee may withhold his patent altogether from public use he must logically and necessarily be permitted to impose any conditions which he chooses upon any use which he may allow of it. The defect in this thinking springs from the substituting of inference and argument for the language of the statute and from failure to distinguish between the rights which are given to the inventor by the patent law and which he may assert against all the world through an infringement proceeding and rights which he may create for himself by private contract which, however, are subject to the rules of general as distinguished from those of the patent law. While it is true that under the statutes as they were (and now are) a patentee might withhold his patented machine from public use, yet if he consented to use it himself or through others, such use immediately fell within the terms of the [515] statute, and as we have seen he is thereby restricted to the use of the invention as it is described in the claims of his patent and not as it may be expanded by limitations as to materials and supplies necessary to the operation of it imposed by mere notice to the public.

The high standing of the court rendering this decision and the obvious possibilities for gain in the method which it approved led to an immediate and widespread adoption of the system, in which these restrictions expanded into more and more comprehensive forms until at length the case at bar is reached, with a machine sold and paid for yet claimed still to be subject not only to restriction as to supplies to be used but also subject to any restrictions or conditions as to use or royalty which the company which authorized its sale may see fit, after the sale, from time to time to impose. The perfect instrument of favoritism and oppression which such a sys-

tem of doing business, if valid, would put into the control of the owner of such a patent should make courts astute, if need be, to defeat its operation. If these restrictions were sustained plainly the plaintiff might, for its own profit or that of its favorites, by the obviously simple expedient of varying its royalty charge, ruin anyone unfortunate enough to be dependent upon its confessedly important improvements for the doing of business.

Through the twenty years since the decision in the *Button-Fastener* case was announced there have not been wanting courts and judges who have dissented from its conclusions, as is sufficiently shown in the division of this court when the question involved first came before it in *Henry* v. *Dick Co.*, 224 U. S. 1, and in the disposition shown not to extend the doctrine in *Bauer* v. *O'Donnell*, 229 U. S. 1.

The exclusive right to "vend" a patented article is derived from the same clause of the section of the statute which gives the exclusive right to "use" such an article [516] and following the decision of the *Button-Fastener case*, it was widely contended as obviously sound, that the right existed in the owner of a patent to fix a price at which the patented article might be sold and resold under penalty of patent infringement. But this court, when the question came before it in *Bauer* v. *O'Donnell*, 229 U. S. 1, rejecting plausible argument and adhering to the language of the statute from which all patent right is derived, refused to give such a construction to the act of Congress, and decided that the owner of a patent is not authorized by either the letter or the purpose of the law to fix, by notice, the price at which a patented article must be sold after the first sale of it, declaring that the right to vend is exhausted by a single, unconditional sale, the article sold being thereby carried outside the monopoly of the patent law and rendered free of every restriction which the vendor may attempt to put upon it. The statutory authority to grant the exclusive right to "use" a patented machine is not greater, indeed it is precisely the same, as the authority to grant the exclusive right to "vend," and, looking to that authority, for the reasons stated in this opinion we are convinced that the exclusive right granted in every

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patent must be limited to the invention described in the claims of the patent and that it is not competent for the owner of a patent by notice attached to its machine to, in effect, extend the scope of its patent monopoly by restricting the use of it to materials necessary in its operation but which are no part of the patented invention, or to send its machines forth into the channels of trade of the country subject to conditions as to use or royalty to be paid to be imposed thereafter at the discretion of such patent owner. The patent law furnishes no warrant for such a practice, and the cost, inconvenience and annoyance to the public which the opposite conclusion would occasion forbid it.

It is argued as a merit of this system of sale under a [517] license notice that the public is benefited by the sale of the machine at what is practically its cost and by the fact that the owner of the patent makes its entire profit from the sale of the supplies with which it is operated. This fact, if it be a fact, instead of commending, is the clearest possible condemnation of, the practice adopted, for it proves that under color of its patent the owner intends to and does derive its profit, not from the invention on which the law gives it a monopoly but from the unpatented supplies with which it is used and which are wholly without the scope of the patent monopoly, thus in effect extending the power to the owner of the patent to fix the price to the public of the unpatented supplies as effectively as he may fix the price on the patented machine.

We are confirmed in the conclusion which we are announcing by the fact that since the decision of *Henry* v. *Dick Co.*, 224 U. S. 1, the Congress of the United States, the source of all rights under patents, as if in response to this decision, has enacted a law making it unlawful for any person engaged in interstate commerce "to lease or make a sale or contract for sale of goods * * * machinery, supplies or other commodities, *whether patented or unpatented*, for use, consumption or resale * * * or fix a price charged therefor * * * on the condition, agreement or understanding that the lessee or purchaser thereof shall not use * * * the goods * * * machinery, supplies or other commodities of a competitor or competitors of the les-

sor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce." 38 Stat. 730.

Our conclusion renders it unnecessary to make the application of this statute to the case at bar which the Circuit Court of Appeals made of it, but it must be accepted by us as a most persuasive expression of the public [518] policy of our country with respect to the question before us.

It is obvious that the conclusions arrived at in this opinion are such that the decision in *Henry* v. *Dick Co.*, 224 U. S. 1, must be regarded as overruled.

Coming now to the terms of the notice attached to the machine sold to the Seventy-second Street Amusement Company under the license of the plaintiff and to the first question as we have stated it—

This notice first provides that the machine, which was sold to and paid for by the Amusement Company, may be used only with moving-picture films containing the invention of reissued patent No. 12,192, so long as the plaintiff continues to own this reissued patent.

Such a restriction is invalid because such a film is obviously not any part of the invention of the patent in suit; because it is an attempt, without statutory warrant, to continue the patent monopoly in this particular character of film after it has expired, and because to enforce it would be to create a monopoly in the manufacture and use of moving-picture films, wholly outside of the patent in suit and of the patent law as we have interpreted it.

The notice further provides that the machine shall be used only upon other terms (than those stated in the notice) to be fixed by the plaintiff, while it is in use and while the plaintiff "owns said patents." And it is stated at the bar that under this warrant a charge was imposed upon the purchaser graduated by the size of the theater in which the machine was to be used.

Assuming that the plaintiff has been paid an average royalty of $5 on each machine sold, prescribed in the license agreement, it has already received over $200,000 for the use of its patented improvement, which relates only to the

method of using the films which another had invented, and yet it seeks by this device to collect during the life of the patent in suit what would doubtless aggre[519]gate many times this amount for the use of this same invention after its machines have been sold and paid for.

A restriction which would give to the plaintiff such a potential power for evil over an industry which must be recognized as an important element in the amusement life of the nation, under the conclusions we have stated in this opinion, is plainly void, because wholly without the scope and purpose of our patent laws and because, if sustained, it would be gravely injurious to that public interest, which we have seen is more a favorite of the law than is the promotion of private fortunes.

Both questions as stated must be answered in the negative and the decree of the Circuit Court of Appeals is affirmed.

Mr. Justice McReynolds concurs in the result.

Mr. Justice Holmes, dissenting.

I suppose that a patentee has no less property in his patented machine than any other owner, and that in addition to keeping the machine to himself the patent gives him the further right to forbid the rest of the world from making others like it. In short, for whatever motive, he may keep his device wholly out of use. *Continental Paper Bag Co.* v. *Eastern Paper Bag Co.*, 210 U. S. 405, 422. So much being undisputed, I can not understand why he may not keep it out of use unless the licensee, or, for the matter of that, the buyer, will use some unpatented thing in connection with it. Generally speaking, the measure of a condition is the consequence of a breach, and if that consequence is one that the owner may impose unconditionally, he may impose it conditionally upon a certain event. *Ashley* v. *Ryan*, 153 U. S. 436, 443; *Lloyd* v. *Dollison*, 194 U. S. 445, 449; *Non debet, cui plus licet, quod minus est non licere*, D. 50, 17, 21.

[520] No doubt this principle might be limited or excluded in cases where the condition tends to bring about a state of things that there is a predominant public interest to

prevent. But there is no predominant public interest to prevent a patented teapot or film feeder from being kept from the public, because, as I have said, the patentee may keep them tied up at will while his patent lasts. Neither is there any such interest to prevent the purchase of the tea or films, that is made the condition of the use of the machine. The supposed contravention of public interest sometimes is stated as an attempt to extend the patent law to unpatented articles, which, of course, it is not, and, more accurately, as a possible domination to be established by such means. But the domination is one only to the extent of the desire for the teapot or film feeder, and if the owner prefers to keep the pot or the feeder unless you will buy his tea or films, I can not see, in allowing him the right to do so, anything more than an ordinary incident of ownership, or, at most, a consequence of the *Paper Bag Case*, on which, as it seems to me, this case ought to turn. See *Grant* v. *Raymond*, 6 Pet. 218, 242.

Not only do I believe that the rule that I advocate is right under the *Paper Bag Case*, but I think that it has become a rule of property that law and justice require to be retained. For fifteen years, at least since *Bement* v. *National Harrow Co.*, 186 U. S. 70, 88–93, if not considerably earlier, the public has been encouraged by this court to believe that the law is as it was laid down in *Heaton-Peninsular Button-Fastener Co.* v. *Eureka Specialty Co.*, 77 Fed. Rep. 288, 25 C. C. A. 267, and numerous other decisions of the lower courts. I believe that many and important transactions have taken place on the faith of those decisions, and that for that reason as well as for the first that I have given, the rule last announced in *Henry* v. *Dick Co.*, 224 U. S. 1, should be maintained.

I will add for its bearing upon *Straus* v. *Victor Talking* [521] *Machine Co.*, *ante*, 490, that a conditional sale retaining the title until a future event after delivery, has been decided to be lawful again and again by this court. *Bailey* v. *Baker Ice Machine Co.*, 239 U. S. 268, 272. I confine myself to expressing my views upon the general and important questions upon which I have the misfortune to differ from the majority of the court. I leave on one side the question of the effect of the Clayton Act, as the court has done, and also what I might think if the *Paper Bag Case* were not up-

held, or if the question were upon the effect of a combination of patents such as to be contrary to the policy that I am bound to accept from the Congress of the United States.

Mr. Justice McKENNA and Mr. Justice VAN DEVANTER concur in this dissent.

AMERICAN GRAPHOPHONE CO. ET AL. *v.* BOSTON STORE OF CHICAGO.

(District Court, N. D. Illinois, E. D. September 3, 1915.)

[225 Fed. Rep., 785.]

1. PATENTS 191—RIGHTS OF PATENTEES—CONTRACTS.—A patentee may, while exercising any of his three coördinate monopoly rights of making, selling, and using, reserve by proper agreement such portion thereof as he may see fit; but after he has once allowed the patented article to pass out of the monopoly, without committing, by proper agreement, the one to whom the article comes to the observance of an obligation on his part, he can not recall it, or claim that by notice he has burdened the article with such reservation.[a]

   [Ed. Note.—For other cases, see Patents, Cent. Dig. § 268; Dec. Dig. 191.]

2. PATENTS—RIGHTS OF PATENTEE—CONTRACTS.—An agent or vendee of a patentee may, by direct covenant, bind himself to the observance of price restriction imposed as a condition on which exclusive right of sale by the patentee is being exercised.

   [Ed. Note.—For other cases, see Patents, Cent. Dig. § 268; Dec. Dig. 191.]

3. PATENTS 257—RIGHTS OF PATENTEE—CONTRACTS.—Whether a violation of a contract by an agent or vendee of a patentee to observe price restriction, imposed as a condition on which exclusive right of sale by patentee is being exercised, may be dealt with as for infringement or breach of contract, enforceable in equity, is immaterial as between the parties, except only as it may affect the jurisdiction of the court to be invoked; but, where the contract is to be taken as the measure of the agent or vendee's right, a failure to observe its stipulations is an infringement.

   [Ed. Note.—For other cases, see Patents, Dec. Dig. 257.]

In Equity. Suit by the American Graphophone Company and another against the Boston Store of Chicago. Motion to dismiss amended bill of complaint and order made to show cause in 10 days why injunction should not be granted.

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[a]

Elisha K. Camp, of New York City, *Daniel N. Kirby*, of St. Louis, Mo., and *Taylor E. Brown*, of Chicago, Ill. (*Brown & Mehlhope*, of Chicago, Ill., and *Nagel & Kirby*, of St. Louis, Mo., of counsel), for plaintiffs.

Hamilton Moses, of Chicago, Ill. (*Moses, Rosenthal & Kennedy*, of Chicago, Ill., of counsel), for defendant.

GEIGER, District Judge.

[1] I shall consider the contract set out in the complaint as though it were entered into between the defendant and the plaintiff American Graphophone Company. The case is of importance only in so far as it presents the question: Can a patentee, upon a sale of a patented article, by contract require of his immediate vendee the observance of price restrictions upon resale?

Prior to the decision in *Bauer* v. *O'Donnell*, 229 U. S. 1, 33 Sup. Ct. 616, 57 L. Ed. 1041, 50 L. R. A. (N. S.) 1185, Ann. Cas. 1915A, 150, this question, now raised upon the motion to dismiss, would have received an affirmative answer on the authority of *Victor* v. *The Fair*, [786] 123 Fed. 424, 61, C. C. A. 58, the cases therein cited, *Bement* v. *Harrow Co.*, 186 U. S. 70, 22 Sup. Ct. 747, 46 L. Ed. 1058, *Henry* v. *Dick*, 224 U. S. 1, 32 Sup. Ct. 364, 56 L. Ed. 645, Ann. Cas. 1913D, 880, and certain other cases, particularly the so-called Anti-Trust cases, which involve patents and patent rights. The determination of the motion, as I think, depends upon the effect, if any, to be given to *Bobbs-Merrill Co.* v. *Straus*, 210 U. S., 339, 28 Sup. Ct. 722, 52 L. Ed. 1086, and *Bauer* v. *O'Donnell*, 229 U. S. 1, 33 Sup. Ct. 616, 57 L. Ed. 1041, 50 L. R. A. (N. S.) 1185, Ann. Cas. 1915A, 150, as modifying the views thus heretofore entertained.

Now, in the *Bobbs-Merrill* case, it was held that the exclusive right of vending a publication, as secured by the copyright statute, did not confer the right, by notice, to burden the copyrighted article with respect to resale price, in whosesoever hands it may come; that is to say, it was held that the right of vending does not include that manner of qualifying title to the thing sold. This seemed to be of the essence of the holding, for the court said:

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"The learned counsel for the appellant in this case in the argument at bar disclaims relief *because of any contract*, and *relies solely upon the copyright statutes*, and rights therein conferred." 210 U. S. 346, 28 Sup. Ct. 724, 52 L. Ed. 1086.

Again:

"The *precise question*, therefore, in this case is: Does the sole right to vend (named in section 4952) secure to the owner of the copyright the right, *after a sale* of the book to a purchaser, to restrict future sales of the book at retail, to the right to sell it at a certain price per copy, *because of a notice in the book that a sale at a different price will be treated as an infringement*, which notice has been brought home to one undertaking to sell for less than the named sum? We do not think the statute can be given such a construction, and it is to be remembered that this is purely a question of statutory construction. *There is no claim in this case of contract limitation, nor license agreement controlling the subsequent sales of the book.*"

Bauer v. *O'Donnell* presented, in respect of a patented article, the identical facts of the *Bobbs-Merrill* case, and twice the court stated the proposition for decision thus:

(1) "May a patentee *by notice* limit the price at which future retail sales of the patented article may be made, such article being in the hands of a *retailer by a purchase from a jobber* who has paid to the agent of the patentee the full price asked for the article sold?"

(2) "The real question is whether in the exclusive right secured by statute to 'vend' a patented article there is included the right, *by notice*, to dictate the price at which subsequent sales of the article may be made. The patentee relies solely *upon the notice* quoted to control future prices in the resale by a purchaser of an article said to be of great utility and highly desirable for general use."

The decision in substance is that, when the patentee sells, he cannot thereafter impeach the fact of sale, nor the transfer of title of the article, by claiming that he had affixed a notice thereto which qualified the right of the seller or purchaser on resale to agree upon any price; but the question here is: Can a patentee, while in the act of exercising his monopolistic right of sale, lawfully bind his vendee to terms of resale to be respected by the latter? It is the question [787] which in the *Victor case*, 123 Fed. 424, 61 C. C. A. 58, supra, was somewhat more broadly stated to involve these facts:

"The bill very clearly shows that appellants said to the jobber: 'We are unwilling to part with the whole of our monopoly. There are no terms on which we will give you an unrestricted right to deal

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in our machines. However, if you choose to pay our price for a limited right, we will place our machines in your hands to be sold by you, or by dealers under you, to the public at not less than $25 each'—and that the jobber *explicitly accepted this offer*."

Grant that a patentee can not, by mere notice, burden an article during the life of the patent with a resale price restriction, that he can not make a notice attached to the article discharge the function of a "covenant running with the land," as in real-estate sales, and that, when he *sells*, he *sells*, we still have the question: How effectively can he and his vendee bargain respecting the exercise of his exclusive right of sale? If it be the law that he can not make *any* bargain with *his vendee* which involves price restriction, then, of course, in that respect he is on competitive, and not on monopolistic, ground. He is in the position where he may rightfully withhold the manufacture, use, and sale from the whole public, and yet, when he proceeds to sell, must submit to the very policy which the public, in granting him the monopoly, has surrendered to him.

Now, as I view the recent adjudications, the *Victor case*, supra, has two aspects which are significant: First, it announces the general proposition that the patentee and his vendee may bargain in any way respecting the scope of the former's release of his monopoly right. Therein it is in accord with the later cases (*Bement*, *Dick*, and the Anti-Trust cases). Secondly, that the notice affixed to the patented article is a sufficient reservation of his right as between himself and the public. Therein, it is clearly overruled by *Bauer* v. *O'Donnell.* If the general proposition first above is also overruled, it seems difficult to find a foundation for the cases which subsequently affirmed it. That such is not the intended effect of the *Bauer case* seems clear from the language used in stating the question therein to be decided, as well as the direct affirmance of the *Bement* and *Dick cases*, which involve, fundamentally, that very proposition.

It is suggested that the distinction between the *Bement*, *Creamery Package* (179 Fed. 115, 102 C. C. A. 413), *Bath Tub* (226 U. S. 20, 33 Sup. Ct. 9, 57 L. Ed. 107), and *Rubber Tire Wheel* (154 Fed. 358, 83 C. C. A. 336) *cases* and the pres-

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ent case is this: That the patentee may sell or assign his *right to sell*, and introduce a covenant for price restriction; that he may sell his right to *manufacture and sell*, and introduce a covenant for price restriction; but that he cannot sell his own patented article and compel his vendee to observe a covenant for a resale price. This attempted distinction, it seems to me, loses sight of the fundamental notion of the patentee's right. It does not help to say that, after a patentee has exhausted his right, he can no longer exercise it, or that, when he has once sold to an individual for a full price, the public cannot be barred from the full and unrestricted use and right of resale. Those are truisms. But what distinction is there between selling or assigning the right to sell—to speak plainly, between licensing to sell on terms of resale, and *selling* [788] the patented article on terms of resale? Each is or involves the bargaining away of the right secured by the patent, though the form of obligation or the manner of exercising may be different. Naturally, an absolute sale by a patentee of his patented article is the highest form of license through which the purchaser and the public are admitted to the inventor's right, so far as they may enjoy it, in the use and sale of the particular article embodying the invention. In each case, however, the licensee or vendee acquires the same right, having the same origin, and in no event exercisable without the permission of the patentee. In each, the transmission by the patentee of a whole or a part of the exclusive right which has been granted him with respect to his inventive concept is (in whole or in part) the subject of the bargain; and the fact that, in the one, the bargain also involves the transfer of title to a physical thing, embodying the concept, does not furnish a basis for distinguishing the situations in so far as they fundamentally have this common element which no one can enjoy or practice unless he can make terms with the patentee.

The covenant for price restriction in the *Bement* and other cases referred to, although found in a license to manufacture and sell, was germane to the patentee's exclusive right of sale. It was assumed in all these cases that such

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covenant was prima facie violative of public policy, but that it was met and overcome by the fact that the public, through the grant of the patent, had given the articles to be sold a status which enabled monopolistic bargaining; that therefore the rules respecting ordinary sales could not apply. It is impossible, in my judgment, to draw a tenable distinction between those cases and the case of a direct sale by the patentee of his patented article.

To state it again, in different form: If the patentee may say to the world, "I will confer upon any one, by license, the right to manufacture and sell my patented article, provided he will observe a price, fixed by me, at which the article is sold to another," he can say, "I will manufacture the patented articles myself, and I will sell to no one except on condition that he observe a resale price to be fixed by me." And he can do so for the reason that the article, because of its embodiment of the invention, has been made a subject of lawfully restrictive price bargaining; and the *Wall Paper* (212 U. S. 233, 29 Sup. Ct. 280, 53 L. Ed. 486) and *Dr. Miles Medical* (220 U. S. 393, 31 Sup. Ct. 376, 55 L. Ed. 502) cases are most persuasive in supporting such view. The language of the Supreme Court in the *Miles* case (see 220 U. S. 401, 31 Sup. Ct. 376, 55 L. Ed. 502) could give no clearer recognition to the full right of the patentee *to bargain* for price restriction. The statement is almost made in plain words that, if the proprietary medicine were a patented article, the contract there in question would, as *between the parties*, receive the protection of the patent laws as construed in the *Bement case.*

In view of the language in *Bauer* v. *O'Donnell*, which discloses so clear a purpose to limit it to the precise facts, it is my judgment that it does not, and was not intended to, overrule the other cases, which seem so firmly to have established the general proposition upon which the sufficiency of the complaint in the present case depends. In other [789] words, the complaint shows a contract which, against the defendant, as a purchaser from the patentee, is valid and enforceable.

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[2, 3] I appreciate that these views may not be in harmony with those expressed in other jurisdictions since the decision in *Bauer* v. *O'Donnell*, and for that reason have reduced them to the form of a memorandum. The conclusions are:

(1) That *Dick* v. *Henry*, *Bement* v. *Harrow Co.*, *Victor* v. *The Fair*, and the other cases, supra, so far as they permit a patentee, *while exercising* any of his three coördinate monopoly rights, by proper agreement to reserve such portion thereof as he sees fit, have not been overruled by *Bauer* v. *O'Donnell;* but that, after he has once allowed the patented article to pass out of the monopoly, without committing, by proper agreement, the one to whom the article comes, to the observance of an obligation on his part, he cannot then recall it, or claim that, by a notice, he burdened the article with such reservation.

(2) That an agent or vendee of a patentee may, by direct covenant or agreement, be bound to the observance of price restriction, imposed as a condition upon which exclusive right of sale by the patentee is being exercised. Whether a violation of such agreement be dealt with as for infringement or breach of a contract, enforceable in equity, is immaterial as between the patentee and his contractee, save only as it may affect the jurisdiction to be invoked.

(3) That the complaint states a good cause of action against the defendant. If the contract is to be taken as the measure of the defendant's right, it seems to me that a failure to observe its explicit stipulation constitutes infringement. Certainly the breach of the agreement, if valid, should entitle plaintiffs to relief in equity.

An order may be entered overruling the motion to dismiss. The application for an injunction, involving as it does the same fundamental questions as the motion to dismiss, should also be granted; and, unless the defendant shall, within 10 days, indicate its desire to oppose such application upon grounds not involved in the motion to dismiss, an injunction may go.

Syllabus.

UNITED STATES v. SOUTHERN PAC. CO. ET AL.

(District Court, D. Utah. March 9, 1917.)

[239 Fed. Rep. 998.]

MONOPOLIES 16(1)—ANTI-TRUST ACT—EXISTING RELATIONS—NEW LEASE.—Where the relation of lessor and lessee between two railroad corporations, whose lines had been originally constructed as part of the same general system and continuously operated under one management, was reversed in 1885 by the surrender of the leases and a lease of the lines belonging to the former lessee to the former lessor, and that lease was superseded by a new lease in 1893 for the balance of the term of the lease of 1885, the new lease making only immaterial changes in the former lease, neither of those transactions affected the exemption from the operation of Sherman Anti-Trust Act July 2, 1890, c. 647, 26 Stat. 209, of the proprietary relations existing prior to the passage of that act.[a]

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 12.]

MONOPOLIES 16(1)—ANTI-TRUST ACT—EFFECT OF STATE STATUTE.—That a lease of railroad lines was not authorized by State statutes does not render it subject to the Anti-Trust Act, since that act deals with actual conditions affecting interstate commerce, whether they are authorized by State statute or not.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 12.]

MONOPOLIES 16(1)—ANTI-TRUST ACT—EXISTING RELATIONS—NATURALLY COMPETING COMPANIES.—Where there had been, since 1870, a continuous common control of the railroads owned by two corporations, effected by leases and unquestioned by the State, so that there never had been from the time of their construction any existing competition between them, and the lessee in 1899 purchased the stock of the lessor company, the Anti-Trust Act does not apply, though two of the lines would be competing if the relationship were dissolved, since that act was not intended to create competition that had never before existed by destroying a proprietary relationship existing at the time of its passage.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 12.]

STATUTES 219—CONSTRUCTION—EXECUTIVE CONSTRUCTION—COMMISSION APPOINTED BY CONGRESS.—The settlement of the indebtedness of the Central Pacific Railroad Company to the United States, arranged by a commission consisting of the Secretary of the Treasury, the Secretary of the Interior, and the Attorney General, appointed by Congress to arrange such a settlement after Congress had knowledge that the lines of the Central Pacific Company had been leased to the Southern Pacific Company, in which settlement the interest of the lessee had been recognized by requiring it to guarantee the

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bonds given to secure the settlement notes, and which settlement had been approved by the President, is entitled to more weight than the administra[999]tive construction of a statute by ordinary public officers subject to legislative restraint, as a construction of the Anti-Trust Act as not applying to the relation between the roads.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 296, 297.]

Railroads 131—Incorporation—Statute—Lease and Sale of Stock.—The Pacific Railroad Acts (Act July 1, 1862, c. 120, 12 Stat. 489; Act July 2, 1864, c. 216, 13 Stat. 356; Act June 20, 1874, c. 331, 18 Stat. 111), requiring the Central Pacific Railroad to maintain physical conection with the Union Pacific, to make a through line, and to furnish equal advantages and facilities as to rates, time, and transportation, were not violated by the lease of the lines of the Central Pacific to the Southern Pacific, and the subsequent purchase by the latter of the stock of the former, so long as the statutory requirements were observed.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 404–406.]

Carland, Circuit Judge, dissenting.

In Equity. Suit by the United States against the Southern Pacific Company and others to enjoin and dissolve an alleged monopoly and combination in restraint of trade and commerce. Petition dismissed.

E. F. McClennen, Sp. Asst. Atty. Gen., of Boston, Mass., and *James W. Orr*, Sp. Asst. Atty. Gen., of Atchison, Kans. (*The Attorney General*, *C. Carroll Todd*, Asst Atty. Gen., and *Edward E. Gann*, Sp. Asst. Atty. Gen., on the briefs), for the United States.

Garret W. McEnerney and *Peter F. Dunne*, both of San Francisco, Cal. (*J. P. Blair*, of New York City, and *Wm. F. Herrin*, of San Francisco, Cal., on the briefs), for defendants.

Perry D. Trafford, of New York City, for Union Trust Co. of New York.

Before Sanborn, Hook, and Carland, Circuit Judges.

Hook, Circuit Judge.

This is a suit by the United States to enjoin and dissolve an alleged monopoly and combination in restraint of trade

and commerce, formed by a lease to the Southern Pacific Company until January 1, 1984, of the railroads of the Central Pacific Railway Company, and by the acquisition by the former company of all the stock of the latter, in violation of the Sherman Anti-Trust Act of July 2, 1890. It is also charged that the control so obtained by the Southern Pacific Company is contrary to the Pacific Railroad Acts of July 1, 1862 (12 Stat. 489, c. 120), July 2, 1864 (13 Stat. 356, c. 216), and June 20, 1874 (18 Stat. 111, c. 331).

The needs of the case do not require a history in detail of the origin and growth of the various railroads which the Government regards as composing two independent systems that should be kept separate and competitive. It will be sufficient to refer generally to the two companies and their respective constituents and predecessors, inclusively, as the Southern Pacific and the Central Pacific, and to speak more precisely only when necessary. We may say in the beginning that the location and physical interdependence of the lines of these companies in California and Oregon give the distinct appearance of a single system of railroads. So clearly is this so of the lines in California and [1000] Oregon north of Sacramento that when an attempt was made in 1913, in the matter of the dissolution of the combination of the Union Pacific and Southern Pacific, also to divorce the Central Pacific from the Southern Pacific, it was generally agreed they should be left with the latter company. It is equally clear as regards the Central Pacific and Southern Pacific lines in California south from Sacramento and San Francisco. Those of the Central Pacific appear on the map as natural links and parts of the Southern Pacific system. Practically all of the spurs, branches, and tributary feeders of the Central Pacific lines are the property of the Southern Pacific.

It is only when we consider the Central Pacific line from San Francisco to Ogden, Utah, on the one hand, and the Southern Pacific main line from San Francisco, through Yuma and El Paso, to New Orleans, on the other, that the propriety of their common control seems in any degree debatable. This aspect of the railroad map is confirmed in

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and when the Southern Pacific acquired all the stock of the present Central Pacific which was then organized to succeed the old company. In *United States* v. *Union Pacific*, 226 U. S. 61, 85, 33 Sup. Ct. 53, 57 (57 L. Ed. 124), the court said:

"We take it, therefore, that it may be regarded as settled, applying the statute as construed in the decisions of this court, that a combination which places railroads engaged in interstate commerce in such relation as to create a single dominating control in one corporation, whereby natural and existing competition in interstate commerce is unduly restricted or suppressed, is within the condemnation of the act."

Prior to the stock acquisition in 1899 and since there never was a time, in our opinion, when there was in any real substantial sense "a natural and existing competition in interstate commerce" between the Southern Pacific and the Central Pacific, within the intent of the Anti-Trust Act. Prior to 1870 the Southern Pacific lines were a negligible factor as a competitor in such commerce, and thereafter the situation has been as we have described. That competition of the kind mentioned might now result from an enforced independence of the two [1002] companies and a separation of their railroads may be true, but we do not think the statute was intended to create competition by destroying a proprietary relation formed long before its passage and by the very means of which a railroad system has been brought into existence.

[4] That the Southern Pacific control of the Central Pacific was not regarded as contrary to the statutes of the United States appears from the proceedings under the act of July 7, 1898 (30 Stat. 659). By that act a commission, consisting of the Secretary of the Treasury, the Secretary of the Interior, and the Attorney General, was appointed to settle the Central Pacific debt to the United States. The act provided that "any and all settlements" should be subject to the approval of the President. William McKinley was then President, and the other officials were Lyman J. Gage, Cornelius N. Bliss, and John W. Griggs. The settlement was effected as of February 1, 1899. At that time the Central Pacific debt to the United States for Govern-

ment aid in the construction of the lines between Sacramento and Ogden, and Sacramento and San Jose, amounted to $58,812,715.48. More than half of this amount was accrued interest, and it was secured by a statutory lien on the two bond-aided lines, subject to prior first mortgages. In addition, the Central Pacific bonded debt then amounted to $57,471,000, most, if not all, of which was secured by first mortgages upon its various lines of road. It had outstanding $67,275,500 of stock. Before stating the details of the settlement, the conditions in the light of which the statute authorizing it was passed may be briefly mentioned. Congress had been fully aware for many years of the relations between the Central Pacific and the Southern Pacific. As early as 1886 the President transmitted to the House of Representatives a copy of the lease of 1885, and from that time on the connection of the two companies was frequently the subject of official and legislative communications and reports. In February, 1890, a copy of the lease was laid before the Senate, with the report of a committee in which it was said:

"It is manifest from the terms of their lease that any bill for the adjustment and settlement of the debt of the Central Pacific Company must, in order to be efficacious, contain provisions by which this lease and the obligations of the Southern Pacific Company under it shall become security to the United States, and that the consent of the Southern Pacific Company shall be obtained to such provisions of the bill."

The committee was of the opinion that the existing security of the Government on the Central Pacific property was inadequate, and that in case of foreclosure of the first mortgages the property would be substantially exhausted in satisfying them. They reported that among the plans suggested to them was one "that all the associated lines forming the Southern Pacific Company (and these include the Central Pacific as consolidated) become parties" to 2 per cent bonds of the United States secured by a first lien upon the consolidated properties of all the lines. The above is but a small part of a continuous history of legislative efforts in the years preceding the act appointing the commission. Congress was fully informed of the lease and its terms, and that in any conventional settlement the Southern Pacific

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could not be [1003] ignored, but had to be reckoned with. Agreement or litigation with the Southern Pacific were unavoidable alternatives, and the remedy by foreclosure of the statutory lien meant probable substantial loss. While the bills introduced in Congress to effect a direct legislative settlement did not pass, it does not appear that the failure was due to a definite opposition of that body to the relation between the two companies. But, however that may be, the whole situation in all its angles and complications was public history, and with definite knowledge of it Congress committed the settlement to the commission. The commission was given "full power to settle the indebtedness * * * upon such terms and in such manner as may be agreed upon by them, or by a majority of them, and the owners of said railroads." The power, however, was subject to the following limitations: The Government was to receive not less than the full amount of principal and interest due it, in equal semi-annual installments, with interest not less than 3 per cent per annum, payable semi-annually, "with such security as to said commission may seem expedient"; final payment and full discharge not to be postponed beyond 10 years, all to become due upon default in any installment or interest, and if settlement was not perfected the President should proceed at once to foreclose. No other conditions than these were prescribed.

An agreement of settlement as of February 1, 1899, was made and signed by the commissioners, the Central Pacific, and Messrs. Speyer & Co., who were managing the reorganization of that company. It was approved by the President. Contemporaneously with the consummation of the settlement the Central Pacific was reorganized under a plan that provided for a new Central Pacific Company and its issue of $100,000,000 of first refunding 4 per cent mortgage bonds. The plan also contemplated the guaranty of the bonds by the Southern Pacific and its acquisition of the stock of the new company. There was the same publicity of the details of this plan as generally attends the reorganization of important railroad systems, and the commission was advised of them in the early stages of its preparation. By the agreement of settlement the Central Pacific was to execute to the

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United States 20 promissory notes, dated February 1, 1899, payable, respectively, on or before the expiration of each successive 6 months for 10 years, each for the sum of $2,940,635.48, or one-twentieth of the total debt, and bearing interest at 3 per cent per annum, payable semi-annually. Each note contained a provision for the maturity of all upon partial default, as provided in the act appointing the commission. The Central Pacific, "or its successor company having title to the aforesaid railroads," was also to make an issue of 45-year 4 per cent gold bonds, not exceeding $100,000,000 in all, secured by a first refunding mortgage upon all its railroads, whether bond-aided or not, and all its equipment and terminals. The bonds were to be further secured by the guaranty of the Southern Pacific, and were to be, as expressed in the agreement of settlement, "prior in lien to any lease of the railroads of said Central Pacific." Of these bonds $58,820,000 were to be deposited with the Treasurer of the United States as security for the 20 installment notes. In addition, Speyer & Co., [1004] reorganization managers, were within one month after the execution and delivery of the notes to purchase from the United States without recourse the 4 earliest maturing and pay therefor the face amount, $11,762,543.12, and accrued interest. A proportionate amount of the collateral mortgage bonds was to go with the 4 notes. The above constituted the security which seemed expedient to the commission within the authority conferred by the act of Congress.

The agreement of settlement was carried out in all its details. The lease to the Southern Pacific was subordinated to the mortgage securing the new first refunding bonds by an indenture executed by that company, which recited as consideration "the benefits and advantages to be derived by said party of the first part (the Southern Pacific) from the carrying out of the agreement between the United States, the Central Pacific Railroad Company, and Messrs. Speyer & Co., dated February 1, 1899." On February 15, 1899, the commission reported to the House of Representatives. The report was in general terms and referred to the agreement of settlement, a copy of which accompanied it. No reference to the guaranty of the Southern Pacific appeared in the re-

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port or the agreement, but the proof is convincing that the commission regarded it as a vital feature of a settlement. In the annual report of the Attorney General to the Senate and House of Representatives in November, 1899, the completion of the settlement was set out, but the guaranty of the Southern Pacific was inadvertently stated as being upon the notes, instead of upon the bonds securing them. With the exception of some credits, which will be presently mentioned, the notes held in the treasury of the United States were paid by the checks of the Southern Pacific. That company charged the amounts to the Central Pacific upon their inter-company accounts.

The rule as to the persuasive force of an administrative construction of statutes is a familiar one, and is frequently applied, but in the case before us there was more than the ordinary acts of public officers subject to legislative restraint. Here there was a commission, composed of the very highest officials of the Government, specially created and charged with the adjustment of a difficult and complicated business that had for years engaged the attention of Congress. Limitations upon their power and conditions to be observed were expressly set forth in the statute, but none remotely suggesting any obstacle in the Anti-Trust Act. Except as to those limitations and conditions, plenary power was given them. The relations between the Southern Pacific and the Central Pacific, long a matter of public history, naturally foreshadowed the engagement of the former in any adjustment of the financial condition of the latter; and additional considerations then affecting the other transcontinental railroad companies pointed the same way. So natural, if not inevitable, was the settlement that was made that the omission of limitations now urged is most significant. We do not say the commission was authorized to violate or to sanction the violation of the act of Congress, but the adjustment they effected necessarily involved the question of its pertinence to the business in hand. The acceptance of the guaranty of the Southern[1005]Pacific was a recognition that it had sufficient corporate interest in the Central Pacific to justify it. Without such interest its accommodation guaranty of $100,-000,000 of bonds of another company would manifestly have

been ultra vires—a gross, indefensible excess of its corporate powers. Again, the acceptance of the guaranty implied a recognition of its possible natural result; that is to say, the enforcement of the rights of a guarantor against the property of a debtor. The addition of the stock ownership by the Southern Pacific to its long leasehold interest did not so change the situation as to make unlawful what was not so before.

With knowledge of the settlement, and, it may be fairly presumed, of the details that were public history, Congress authorized the Secretary of the Treasury to dispose of "any notes in his possession touching the indebtedness of the Central Pacific Railroad Company to the United States." Act March 3, 1899, c. 427, 30 Stat. 1245. Further, by act March 3, 1901, c. 831, 31 Stat. 1023, the Secretary of the Treasury was authorized and directed to settle claims for interest growing out of transportation services for the Government "over non-bond-aided lines of the Southern Pacific Company and Central Pacific Railroad Company by crediting" the amounts upon the Central Pacific installment notes. This was done. The claims were just debts of the Government, and the legislative direction to credit those due the Southern Pacific upon the indebtedness of the Central Pacific was a recognition, in some degree, at least, of a relationship between the two companies that justified it. There was no other warrant or authority than that which arose from the proprietary position of the Southern Pacific.

It is contended by both parties that the opinion and decision of the Supreme Court in *United States* v. *Union Pacific*, *supra*, has a decisive bearing upon the case at bar. Aside from the controlling principles of law announced by the court and a matter presently to be mentioned, we do not think so. The Central Pacific was not a party to that suit, and though the relations between it and the Southern Pacific were mentioned in the opinion the references were not condemnatory, but were explanatory of the railroad situation and the movements of traffic. The court said, however, that nothing in its opinion should be considered as preventing the court below from approving or adopting a plan providing

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for the retention by the Union Pacific of the Central Pacific line from San Francisco to Ogden. There is a relevance here in the necessary inference that such retention by the Union Pacific would not have been regarded as contrary to the Anti-Trust Act. On the record then before the court it appeared that the Union Pacific already controlled the line from Portland, Oreg., to Granger, Wyo., and was largely interested in the line from San Pedro, Cal., to Salt Lake City, Utah. The retention by the Union Pacific of the Central Pacific road from San Francisco to Ogden would have given the former company lines from the three important ports—Portland, San Francisco, and San Pedro—to connections with its main line in Utah and Wyoming. In corporate origin each of the three lines was separate and distinct from the others and from the Union Pacific, in the same sense as [1006] the Southern Pacific and Central Pacific are corporately separate. With steamship connections with the Orient, the three lines were theoretically, at least, competitors for foreign traffic destined through those ports eastward to the interior of the United States or to the Atlantic seaboard. But the control of all of them by the Union Pacific was evidently not deemed a suppression of competition sufficiently direct and appreciable to be repugnant to the Anti-Trust Act. The situation considered by the court in that case is not greatly different in its ultimate significance from the case at bar. If the Anti-Trust Act be construed to reach proprietary relations, as distinguished from those of a mere continuous operating character, formed long prior to its passage, whereby divergent or tangential lines of road to widely separated gateways or points in the currents of traffic movement are held in a single ownership or control, its enforcement accordingly would have such a destructive effect upon established, accepted railroad systems of the country that their inclusion within the intent of Congress may well be doubted.

After the decision of the Supreme Court that the combination of the Union Pacific and the Southern Pacific was

unlawful, those companies, to meet the suggestions of the Attorney General, incorporated in the plan to dissolve the combination provisions for the surrender by the Southern Pacific to the Union Pacific of all the Central Pacific lines except one from northern California to the northern State line and a branch therefrom into Oregon. These provisions were in excess of the mandatory requirements of the Supreme Court, and their consummation depended upon the approval of the Railroad Commission of California. Upon a consideration of them the commission expressed the belief that the arrangement would "not substantially benefit the shippers of trans-continental freight either in rates or in service," and that it would be a distinct detriment to local commerce within the State. However, the commission made certain modifications and conditions as to features within its jurisdiction; but the railroad companies were unable to agree to them, and that part of the plan was abandoned. The failure to agree was followed by this suit to separate the Southern Pacific and the Central Pacific, but we think the doubts of the California commission would apply with equal force to the result now sought to be accomplished. It may be observed in this connection that this case of the Government, unlike others of similar character, finds little, if any, support in testimony from complaining shippers or the public generally.

[5] Finally, it is contended that the control of the Central Pacific line from San Francisco to Ogden by the Southern Pacific is in violation of the Pacific Railroad Acts. The proofs show no foundation in fact for this contention. When this suit was brought, and since, the line was being maintained and operated in every particular required as a part of a continuous railroad from the Missouri River to the Pacific coast. In conjunction with the Union Pacific there were through rates, through billings, and through freight, passenger, and mail trains. There were no criticisms of the track, the service, or the schedules. The Government and the public were being served adequately. Those [1007] statutes require physical connection with the

Union Pacific to make a through line and the furnishing of equal advantages and facilities as to rates, time, and transportation without discrimination of any kind. If those requirements are met, it does not seem material whether they are performed by the Southern Pacific as lessee and stockholder or by the Central Pacific independently.

The petition is dismissed.

CARLAND, Circuit Judge (dissenting).

It is difficult to determine from the opinion of the majority exactly upon what ground or grounds the bill in this case is dismissed. The opinion states that:

> "Prior to the stock acquisition in 1899 and since there never was a time, in our opinion, when there was in any real substantial sense 'a natural and existing competition in interstate commerce' between the Southern Pacific and the Central Pacific within the intent of the Anti-Trust Act. * * * That competition of the kind mentioned might now result from an enforced independence of the two companies and a separation of their railroads may be true, but we do not think the statute was intended to create competition by destroying a proprietary relation formed long before its passage and by the very means of which a railroad system has been brought into existence."

If the language first quoted means natural and existing competition in fact, then it is entirely consistent with the claim of counsel for the United States, which is that no such competition existed or could exist by reason of the common control since 1899 of the Central Pacific by the Southern Pacific. If the language means that there could be no competition between the two railroad systems, then the language is inconsistent with the language which follows, wherein it seems to be conceded that but for the common control there would be competition. As the breaking up of an unlawful combination does not create natural competition, but simply removes the barriers which prevent the free flow of interstate commerce, the concession that there might be competition if the combination was broken is also a concession that there is natural competition which is suppressed by reason of the control of the Central Pacific by the Southern Pacific.

The combination which is complained of in this case is alleged to have originated in 1899 in the acquirement of all the stock of the Central Pacific by the Southern Pacific. The fact that prior to the passage of the Anti-Trust Law there had been a practical control of the Central Pacific by the Southern Pacific through a leasing arrangement in no way validates the present combination, if it be unlawful. *Standard Oil Co.* v. *United States*, 221 U. S. 1, 31 Sup. Ct. 502, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912D, 734; *United States* v. *American Tobacco Co.*, 221 U. S. 106, 31 Sup. Ct. 632, 55 L. Ed. 663; *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290, 17 Sup. Ct. 540, 41 L. Ed. 1007; *United States* v. *Delaware & Hudson Co.*, 213 U. S. 366, 29 Sup. Ct. 527, 53 L. Ed. 836; *Philadelphia, Baltimore & Washington R. R. Co.* v. *Schubert*, 224 U. S. 603, 32 Sup. Ct. 589, 56 L. Ed. 911; *Waters-Pierce Oil Co.* v. *Texas*, 212 U. S. 86, 29 Sup. Ct. 220, 53 L. Ed. 417; *United*
[1008] *States* v. *Kissel*, 218 U. S. 601, 31 Sup. Ct. 124, 54 L. Ed. 1168; *Armour Packing Co.* v. *United States*, 209 U. S. 56, 28 Sup. Ct. 428, 52 L. Ed. 681.

There does not seem to be any conflict in the authorities upon this proposition. The evidence in the record in my opinion establishes beyond question that the Southern Pacific, extending from San Francisco Bay to New Orleans, with its steamship connection with New York, is a natural competitor of the Central Pacific, both as to California-Atlantic seaboard freight and central and western United States freight to and from California. A mere inspection of the different routes over which interstate commerce is moved through the El Paso and Ogden gateways would seem to show that the two roads are natural competitors. If they are competitors, and the Southern Pacific, as it is admitted, controls the Central Pacific, it follows that the free flow of interstate commerce is restrained. *United States* v. *Union Pacific Railroad Co.*, 226 U. S. 61, 33 Sup. Ct. 53, 57 L. Ed. 124; *Northern Securities Co.* v. *United States*, 193 U S. 197, 24 Sup. Ct. 436, 48 L. Ed. 679.

I do not think the evidence shows that the Central Pacific and the Southern Pacific were created originally and have

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always continued to be one system. They have always been and are now operated as separate systems. The settlement by the United States of the debt of the Central Pacific in 1899 cannot be held to estop the United States from insisting at this time that the combination between the two roads is in violation of the Anti-Trust Act. It is not remarkable that in the proceedings resulting in the settlement, so far as they appear of record, the Anti-Trust Law was not referred to, as little attention was given in those days to the Anti-Trust Law of July 2, 1890.

Finally, I am unable to reconcile the decision of the Supreme Court in the case of *United States* v. *Union Pacific Railroad Co.*, 226 U. S. 61, 33 Sup. Ct. 53, 57 L. Ed. 124, with the conclusion reached by the majority in this case. The Union Pacific and the Central Pacific constitute one trans-continental line from Omaha, Nebr., to the Pacific coast. Of course, it would not be objectionable for the Union Pacific to control the Central Pacific, so far as anything in the record in this case is concerned, because it would simply be the same through line, with no competition involved as between these two roads; but the Supreme Court held in the case cited that the control of the Southern Pacific by the Union Pacific was a combination in restraint of commerce that should be broken up.

In this case the Southern Pacific, which the Supreme Court held was in competition with the Union Pacific, controls the Central Pacific, or another section of the through line from Omaha to the coast. How is the decree of the Supreme Court in the *Union Pacific case* to become effective, with the competitor of the Union Pacific controlling the Central Pacific? If it was unlawful for the Union Pacific, being one section of the through line, to control the Southern Pacific, why is it not unlawful for the Southern Pacific to control the other section of the through line? It is said in the opinion that there is no [1009] evidence of complaint by shippers of the alleged unlawful combination. The Attorney General, in instituting this action, represents the public, including shippers.

For these reasons, briefly stated, I dissent from the conclusion reached by the majority.

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FREY & SON (INC.) v. WELCH GRAPE JUICE CO.[a]

(Circuit Court of Appeals, Fourth Circuit. February 26, 1917.)

[240 Fed. Rep., 114.]

MONOPOLIES 28—ACTION FOR DAMAGES—EVIDENCE—ADMISSIBILITY.—In an action by a wholesaler against a manufacturer, who had refused to sell his product to plaintiff at less than the price charged retailers, because plaintiff had been selling the product at less than the price fixed by the manufacturer, where the declaration contained two counts, one for unlawful combination to control the price of the product, and the [115] other for unlawful discrimination against plaintiff, it was error to admit evidence offered by defendant that the profit to dealers on the product at the list price was the average profit on other groceries, that defendant was not in any combination with manufacturers of other brands of the product to control the price, and that by the custom of the trade the price at which the jobber was expected to sell was fixed by the manufacturer, all of which was irrelevant and incompetent under the issues.[b]

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 18.]

APPEAL AND ERROR 1050 (2)—PREJUDICIAL ERROR—ADMISSION OF EVIDENCE.—In view of the novelty and difficulty of questions presented in an action for unlawful combination and discrimination, the admission of such evidence, in connection with remarks by the trial judge as to the importance of the issues involved, was prejudicial to plaintiff, as obscuring the real issues in the case, though the court correctly charged the jury as to the issues, and told them to disregard the economic questions made by the objectionable testimony; the rule that such a charge will make the error harmless being subject to exception, where the testimony has made such a strong impression on the jury that its withdrawal will not remove the effect caused by its admission.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4154.]

MONOPOLIES 28—DAMAGES—MEASURE—LOSS OF PROFITS.—The measure of a jobber's damages for unlawful discrimination against him by a manufacturer whose product the jobber had been selling for several years, the sales increasing each year, is not limited to profits lost on sales which he proved he could have made; but the jury could have inferred, from the average increase of sales, the probable increase during the time of the discrimination, and could allow for the loss of profits on such sales.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 18.]

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[a] For charge to the jury on the subsequent trial of the case, see *post*, page 865.

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MONOPOLIES 28—DAMAGES—LOSS OF OTHER SALES.—A jobber, to whom a manufacturer of a well-known product refused to sell his product at less than the regular price charged to retailers cannot recover as damages the loss of profits on sales of other articles to customers desiring that product, who dealt with competing jobbers in order to get all their goods at the same place, since such damages are too remote and uncertain, and could have been prevented by the jobber buying the product at the retailers' price and reselling it without profit.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 18.]

In Error to the District Court of the United States for the District of Maryland, at Baltimore; John C. Rose, Judge.

Action by Frey & Son (Inc.) against the Welch Grape Juice Company. Judgment for defendant, and plaintiff brings error. Reversed.

Horace T. Smith, of Baltimore, Md., and *Daniel W. Baker*, of Washington, D. C., for plaintiff in error.

Charles P. Spooner, of New York city (*John Hinkley* and *Thomas Foley Hisky*, both of Baltimore, Md., on the brief), for defendant in error.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

WOODS, Circuit Judge.

This action is for damages under the Federal statutes forbidding combinations and discriminations in restraint [116] of trade. The verdict was for the defendant, and the plaintiff asks a new trial for errors assigned in the admission of testimony and in the charge on the subject of damages.

There was evidence tending to support these allegations of the declaration: The defendant, a manufacturer and seller in Baltimore of an established article of commerce known as "Welch's grape juice," had an understanding or agreement with the jobbers to whom it sold that they should sell at not less than a fixed price to retailers. The plaintiff, a wholesale grocer in Baltimore, with a considerable trade in defendant's goods, being contented to take a smaller profit than others, began to sell at a lower price than that the defendant required its customers to charge. For this viola-

tion of its requirements the defendant refused to sell to the plaintiff, except at the list price which it required jobbers to charge retailers. This discrimination resulted in the entire loss of the profits which the plaintiff would have made in the regular course of its sales of Welch's grape juice and loss of trade in other commodities, since customers who desired Welch's grape juice and could not purchase it from the plaintiff transferred their general accounts to other jobbers, who could supply the grape juice.

The declaration was divided into two counts—the damages declared in the first count being for the alleged unlawful combination to control the price; and in the other for the alleged unlawful discrimination in price against the plaintiff. The defendant denied both the unlawful combination and the unlawful discrimination.

In the effort to avoid any appearance of an expression of an opinion on the merits, we have made only such statement of the case as seems necessary to an understanding of the point here involved. The law applicable to the issues of violation of the Federal statutes was not in serious dispute.

Evidence was admitted over the objection of the plaintiff: (1) That the profit to dealers on Welch's grape juice at the listed price prescribed by the defendant was the average profit on other groceries; (2) that the defendant was not in any combination with manufacturers of other kinds of grape juice to control the price; (3) that by the custom of trade the price at which the jobber is expected to sell is fixed by the manufacturer.

[1] All of this evidence was irrelevant and incompetent. The issues made by the pleadings were whether there was an unlawful combination to control the price of grape juice or unlawful discrimination against the plaintiff in charging him a greater price than other jobbers. If there was such a combination to require all dealers to sell at the price fixed by the manufacturer upon the penalty of not being allowed to sell on an equality with other traders, and the plaintiff was the victim of it, it was no defense to show that the plaintiff was required to charge only an average profit, or that it was the custom of trade for manufacturers to violate the law. *Dr. Miles Medical Company* v. *Park & Sons*, 220

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U. S. 373, 31 Sup. Ct. 376, 55 L. Ed. 502. Nor would it avail the defendant against the charges made by the plaintiff to show that it had not violated the law by making a combination with manufacturers of other brands of grape juice.

[2] [117] We cannot help thinking that all this testimony tended strongly to divert the minds of the jury from the real issue. The statutes against trusts, combinations, and discriminations in trade brought such new and unfamiliar prohibitions into the laws of trade that they have been only partially assimilated after a great effort by experienced and learned judges. The admission of the testimony referred to, taken in connection with the remarks of the presiding judge in admitting some of it, as to the importance of the issues to be decided by the jury, must have been prejudicial to the plaintiff in obscuring the real and comparatively simple issues involved in the trial. It is true the charge in clear language stated the real issues and instructed the jury to disregard the economic questions that were made by the objectionable testimony. The general rule is that such a charge will be held to make harmless the error of admitting incompetent testimony, but the rule is not unbending.

"But yet there may be instances where such a strong impression has been made upon the minds of the jury by illegal and improper testimony that its subsequent withdrawal will not remove the effect caused by its admission, and in that case the general objection may avail on appeal or writ of error." *Throckmorton* v. *Holt*, 180 U. S. 552, 21 Sup. Ct. 474, 45 L. Ed. 663.

This was a case for the application of the exception stated.

[3] In his charge, and in interruption of counsel for plaintiff in the course of his argument, the district judge limited the measure of damages to the profit that plaintiff would have made on two particular orders proved to have been given to the plaintiff which it was unable to fill, and to the profit the plaintiff would have made but for the alleged discrimination on 200 cases which it bought from another dealer at a higher price than that charged other dealers by the defendant. This, we think, was error. The damages recoverable were those which arose from the unlaw-

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ful interruption of the plaintiff's business in selling Welch's grape juice. This damage could not as a matter of law be confined to the loss of profit on specific sales which the plaintiff might be able to prove; for in such case, when a merchant's business is broken into, it would ordinarily be impossible for him to know and prove all specific sales he had lost. The plaintiff testified that in the year 1911, before the alleged discrimination began, it sold 190 cases of Welch's grape juice, and it also proved the average increase of its general business for the succeeding years. This average increase of general business was evidence from which the jury could have inferred the probable increase of the sale of this brand of grape juice, had the plaintiff been able to purchase it on the same terms as other jobbers. This evidence, together with that offered by the plaintiff of the per cent of profit made by it on sales of the grape juice, should have been submitted to the jury as data from which, in connection with any other relevant facts, they could arrive at the damage which the alleged combination and discrimination caused the plaintiff. 1 Sedgwick on Damages (9th Ed.) § 182, and cases cited.

[4] We agree with the district judge that the damages arising from the incidental loss of general business in other commodities were too [118] remote and uncertain. Indeed, that loss, if any, the plaintiff might have prevented altogether by purchasing and selling the grape juice without profit.

Reversed.

FREY & SON (INC.) *v.* WELCH GRAPE JUICE COMPANY.*

(District Court, D. Maryland. June 6, 1917.)

[Not reported.]

Manufacturer May not Induce or Bring About Violation of Law.—No man may willfully and knowingly use his money, his industry, his brains, or his right to pick and choose among his would-

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* For opinion of the Circuit Court of Appeals (240 Fed. 114), reversing judgment for defendant, see *ante*, p. 861.

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be customers to induce or bring about a violation of law, or to do or procure the doing of some act which the law forbids.*

COMBINATION IN RESTRAINT OF TRADE NOT JUSTIFIED BY ITS BENEFICIAL EFFECT.—If a contract or combination be in unreasonable restraint of trade, the fact that in a particular given case the court or jury may think the result of a contract or combination may be on the whole beneficial rather than harmful, will not justify such contract or combination.

AGREEMENT FOR DESTRUCTION OF COMPETITION AND FIXING OF PRICES, VOID.—Any agreement having for its purpose the destruction of competition and the fixing of prices, is injurious to the public interest and void.

PARTY TO AGREEMENT TO FIX OR MAINTAIN PRICES, LIABLE FOR DAMAGES.—No man has a right to be a party to an agreement or combination to fix or maintain prices, and one who does something to further such an illegal object is liable in damages to a party thereby injured.

RIGHT OF MAN ENGAGED IN BUSINESS TO CHOOSE HIS CUSTOMERS.—In the absence of a statutory prohibition, any man engaged in business may pick and choose, as he sees fit, his would-be customers.

DISCRIMINATION IN PRICE UNLAWFUL, WHETHER IN FURTHERANCE OF COMBINATION OR NOT.—A discrimiuation in price by a manufacturer between different purchasers of his commodity, under section 2 of the Clayton Act, is an unlawful thing, whether there was a combination in the furtherance of which it was made or not; but in order to recover damages for such a discrimination, it must appear that the effect of such discrimination is substantially to lessen competition.

At Law. Action by Frey & Son (Inc.) against the Welch Grape Juice Company, for damages, for the refusal of defendant to sell it grape juice except at retail prices, because of its refusal to maintain the fixed resale price of grape juice, made by defendant. There was a verdict and judgment for the plaintiff in the sum of $813 for damages to date of suit; the court not allowing damages from date of suit to date of verdict.

Horace T. Smith, of Baltimore, Md., and *Daniel W. Baker*, of Washington, D. C., for plaintiff.

Charles P. Spooner, of New York City, and *John Hinkley* and *Thomas Foley Hisky*, of Baltimore, Md., for defendant.

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* Syllabus by the compilers.

Charge to the Jury.

CHARGE TO THE JURY.

ROSE, District Judge.

Gentlemen of the Jury:

As you know, this case is brought under the Anti-Trust Acts. These acts forbid certain things, and they further say that if anyone is injured by the doing of some of those forbidden things, he may bring a suit at law to recover for the damage so done.

The plaintiff's amended declaration contains two counts. The first alleges that the prohibition against which the defendant is said to have offended is that imposed by the first section of the original Sherman Act, which prohibits contracts, combinations, and conspiracies in the restraint of interstate trade. The second count sets up a breach of the second section of the Clayton Anti-Trust Act, passed October 15, 1914. This section makes it unlawful for any person engaged, as defendant was, in interstate commerce, either directly or indirectly to discriminate in price between different purchasers of commodities, where the effect of such discrimination may be to substantially lessen its competition.

I will first direct your attention to the allegations of the first count. I will not deal with more or less undisputed things alleged in the count. The defendant is engaged in interstate commerce and the plaintiff is also so engaged. These are matters which have been proved and are not in controversy here, so I will pass to the matters which are more vital because more or less seriously disputed. The plaintiff says there was a combination in restraint of trade, inspired and brought about by the defendant, and to which defendant was a party. It says that the particular combination of which it complains was one to prevent any jobber from selling to a retailer Welch's grape juice below certain prices designated by the defendant, and it says it was injured by an act done in furtherance of such combination, viz: by the refusal of the defendant to sell it grape juice because it had in fact refused to become a party to such combination. Ordinarily no man has a right to complain because another man will not sell him something that belongs to that other man, nor does he ordinarily get any better right to complain merely because such other will sell to other persons the kind of things that the one complaining wants to buy, but will not sell them to the complainant. Of course, this rule is not universally true. As to certain sorts of services or accommodations, such as those of a common carrier, the keeper of a public elevator or inn, the operator of a telephone or telegraph line, etc., in which one holds himself ready to serve the public, he must serve all the public and may not, for any arbitrary reason of his own, refuse to serve any particular member of the public. But those cases are exceptional, and have nothing to do with the ordinary sale of goods, wares, and merchandise. There, in the absence of any statutory prohibition, any man may pick and chose as he sees fit among would-be

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customers. I say in the absence of statute, because that is all that is here necessary to say. Whether under any circumstances Congress can constitutionally limit this right it is not necessary in this case to inquire, for Congress has not done so and, indeed, in its last enactment on the subject, it says that nothing contained in the act shall prevent persons engaged in selling goods, wares, and merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade.

Defendant has asked me to say to you that it has an unquestioned right to stop dealing with a jobber for reasons sufficient to itself and that it and any other manufacturer has an unquestioned right to deal with or stop dealing with any jobber who handles his product, and that where it distributes its product through jobbers on whose methods of business it is largely dependent for the sale and distribution of its goods, it has a right to choose the jobbers through whom it will so deal and distribute. Now, all these statements are true. Defendant further asks me, however, to say that the reasons which influence a manufacturer in such cases to choose between jobbers or to stop dealing with a particular jobber are of no consequence. Ordinarily that is true. It is always true, except under circumstances which I shall hereafter specify. The reasons why a dealer has a right to decline to sell to a particular man and ought not to be called on to explain or define his actions in so doing are obvious to every one. Certainly they are obvious to every business man. There are a great many such reasons. You may doubt the credit of some one who wants to buy from you. You could not prove that his credit was not good and would have no right to say to anyone that you did not think it was. Perhaps you could not define to yourself just what were the causes that led you to suspect his credit. Perhaps five times out of six it turned out that you could have sold him safely, but the loss which you would incur on number six, had you sold him, would have been several times the aggregate profit you would have made on sales to numbers one to five. And then, there are other men whose financial responsibility is unquestioned but with whom you think it might not be well to deal. No matter how they get on with other people, you and they do not pull it off comfortably, and business relations between you and them, you fear, will never be worth while. Then, there are others who can pay their bills, and who do pay them when there is no way of getting out of it, with whom you do not want to deal. The sort of people who, on a falling market, always object that the goods are damaged, short in quantity, etc. Most of us come across some people whom experience has taught us it is well to keep clear of. After a while we come to the conclusion that if we lend them a dime on the collateral of a gold dollar we will have reason to regret it. Therefore the law is—and with some very few limitations, I presume, must always be—that whether a man will sell another or not is a matter for the seller to determine for himself. Absolute or nearly absolute as the right to

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select one's customers may be, it is doubtless no more absolute that many of our other rights, such as the right to use our capital, industry, and our brains to their best advantage. I take it, however, and I shall so instruct you, that the law is that no man may willfully and knowingly use his money, his industry, his brains, or his right to pick and choose among his would-be customers to induce or bring about a violation of the law—that is to say, to do or procure the doing of some act which the law forbids.

Now, in this case plaintiff says that the law does forbid any combination or agreement to maintain the price of any article. One must bear in mind what that contention is. It has nothing whatever to do with the right of the defendant to fix the price at which it will sell its goods to anyone. One of the purposes, perhaps one of the principal purposes, of the Sherman Anti-Trust Act was to prevent the growth of monopolies. Now, there is in this case no question as to the defendant's monopolization of the grape juice. Plaintiff does not contend that it can not get grape juice, but its complaint is limited to the charge that it can not get Welch's grape juice. From the nature of things Welch has a monopoly to the production of Welch's grape juice. It necessarily has such a monopoly because quite obviously Welch's grape juice means nothing more or other than grape juice made by Welch. Defendant being the lawful owner of the grape juice manufactured by it, can sell it at whatever price it can induce anybody to pay for it. But Congress has also prohibited combinations, contracts, or conspiracies in restraint of interstate trade. It does not mean that all contracts or combinations which restrain competition are necessarily prohibited by statute. The statute itself is to be read, as the Supreme Court has told us, in the light of reason, but there are certain kinds of contracts and combinations which the Supreme Court has, as I understand it, held to be contracts in unreasonable restraint of trade, and if a contract or combination belongs to that class, the fact that in a particular given case the court or jury may think that the result of a combination or contract may be on the whole beneficial rather than harmful, will not justify such combination. As I understand the decision of the Supreme Court, any agreement having for its purpose the destruction of competition and the fixing of prices, is injurious to the public interest and void.

The purpose of the agreement or combination must be the fixing of prices. That does not mean that the parties to it may not expect, and, for that matter, reasonably expect, to derive various benefits from such fixing and maintaining of prices. It does mean that the purpose of the agreement itself must be to maintain prices. Now no one has a right to be a party to such contract or combination, and one who does become a party to it has no right to do anything to further its object, whether the thing so done would or would not otherwise have been within its clear right. One who does something to further the illegal object and in so doing injures someone else has done wrong, and if that something is done for the promotion or

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furtherance of a contract or combination in restraint of interstate trade, he has done something for which the person injured may require him to account in damages. Now, clearly under this statement of the law, the defendant can not be held liable under the first count unless it was a party to a contract or combination or conspiracy to fix and maintain prices. Defendant denies it was a party to any combination, contract, or conspiracy for such purpose. It says it merely notified the jobbing trade what prices it thought were the lowest at which jobbers could resell its product and make enough return thereon to make it worth their while to push the sale of such product. It is admitted by the plaintiff that there was no written and signed agreement on the subject, and none couched in formal or express terms. A number of jobbers here in Baltimore have testified that they had for years been purchasers of Welch's grape juice from the defendant, and that they had entered into no agreement on the subject; and some of them testified that they did not feel under any obligation, either moral or otherwise, to maintain such prices. Many of them said that they always had maintained such prices, and some of them who so said, said they did so because they would not have handled the goods at all if they could not have resold them at a figure at least as high as that they actually received for them. Others gave as an additional reason that they are in the habit of respecting manufacturers' wishes as to resale prices. Some of them say that they do not think they would be dealing quite fairly with the manufacturers or with their competitors if they did sell below the resale prices named by the manufacturers. On the other hand, there is evidence that certain Baltimore jobbers, actual and potential competitors of the plaintiff, who sold Welch's grape juice, complained to the defendant that plaintiff was cutting prices, and such complaint was made by at least one person who has said that he was not a party to any agreement or combination on the subject of maintaining prices, but who did, according to the testimony offered on behalf of the defendant, say that if the plaintiff continued to cut the price he, the jobber, would have to give up the handling of Welch's grape juice. When such complaint was received by defendant it satisfied itself that the plaintiff was in fact doing so. It is further in evidence that the defendant then notified the jobbers who had complained of plaintiff's price cutting that defendant had cut plaintiff off the list of defendant's distributors and would not thereafter sell plaintiff grape juice. There is further in evidence a circular letter of the defendant sent out to the trade in October, 1912, in which the defendant said that he expected jobbers to maintain its resale prices, and that it would decline to sell those who did not. In this, or another circular of the defendant, in evidence, the jobbers are asked to coöperate with it in maintaining prices. In these circulars it would appear that the defendant did what it could to make dealers believe that it would refuse to sell them if they did not in all respects maintain the price list that it fixed, but defendant's officers and

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employees have testified that they did continue to sell many jobbers who cut prices, and that, although they had refused to sell further to some jobbers who had cut prices, that in no case was the refusal to sell due solely to the cutting of prices. It is in evidence that defendant does sell to most of the wholesale grocers of Baltimore. It admittedly does not sell to all of them. Mr. Welch, who testified on behalf of defendant that it did not, did not, as I recall, appear to know which, if any, of the Baltimore wholesalers it did not sell, wanted to buy, or, in cases in which they did want to buy, what were the reasons which led the defendant to decline to sell them. You have also heard Mr. Frey's testimony with reference to these establishments which, if accurate, would seem to indicate that it was not likely that many of such concerns, if any, would in any event have been able to dispose of any considerable quantity of grape juice had they wanted to sell it and had defendant been willing to sell it to them. It sold the plaintiff for a year and it stopped selling plaintiff. Now there is no question that the only complaint it had concerning plaintiff was connected with his failure to observe resale prices named by defendant. The trouble began, apparently, with the complaint of the other jobbers that the plaintiff was advertising Welch's grape juice at cut-rate prices. Defendant sent its agent to see the plaintiff, who admitted such advertisement had been made, but said it was a mistake and would not occur again. It did occur again, perhaps more than once, and defendant became satisfied, as its officers and employees testified, that no reliance could be placed upon any promises or statements which the president of the plaintiff might make on the subject of maintaining prices. Now of course if you find that someone will tell untruths when it is to his business convenience or profit so to do, you may feel that you do not want to have any business with him, and if you find that the defendant refused to sell to the plaintiff because it believed that Mr. Frey was not a truthful and honest man, and not because he was cutting prices, you would be justified in finding that whether there was any combination or not, the cutting off of the plaintiff was not done in furtherance of such combination, but, apparently, before you can so find you must be persuaded that if plaintiff had frankly told the defendant that it was cutting prices and intended to continue so to do, defendant would have still sold it. It is for you to say whether it is likely, in view of the statements made by Mr. Welch and Mr. Okie, as to the way in which they looked upon anyone who advertised Welch's grape juice at cut-rate prices, that defendant would have continued to sell plaintiff had he announced his intention so to advertise and sell. If you do find that the real reason for defendant refusing further to sell plaintiff was that plaintiff cut prices, and defendant believed the plaintiff would continue so to do, that action was unlawful, if it was done in furtherance of a combination to maintain resale prices, assuming that you shall also find the existence of such a combination. If one large wholesale jobber cuts prices on any com-

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siderable scale, quite obviously his competitors, the other wholesale jobbers, will have to do the same or cease to deal in the article. If there was any such combination, you may hold that it was necessary for its maintenance that defendant should, if it could in some way, stop any large wholesaler from cutting prices.

Was there a combination? I can only say to you that if you shall find the defendant indicated a sales plan to the wholesalers and jobbers, which plan fixed the price below which the wholesalers and jobbers were not to sell to retailers, and you find that the defendant called this particular feature of this plan to their attention on different occasions, and you find that the great majority of them not only did not express any dissent from such plan, but actually coöperated in carrying it out by themselves selling at the prices named, and that some of them thought they had a right to call the attention of defendant to factors of other jobbers to maintain such prices, you may, if you see fit, reasonably find from such facts that there was an agreement or combination forbidden by the Sherman Anti-Trust Act. Of course you understand that the plaintiff must make out its case and must satisfy you by a fair preponderance of the evidence that his case is made out, and if your mind on any issue in the case necessary to your determination is left so in doubt that you do not feel that the evidence preponderates on one side or the other, the defendant must have the benefit of it. The combination, contract, agreement, conspiracy or whatever you choose to call it, does not have to be made in any formal way. If you know that I want you to do something, and you know that I would not deal with you unless you do that something, and you keep on doing it, there may be an agreement between us to do that very thing, though never a word has been said. If you shall find that the defendant intended the jobbers to whom it sold to understand that it wanted them to maintain the resale price named by it, that it would protect those who did maintain such prices by refusing to sell to anyone who did not, and that it would investigate any apparently well-founded complaint made by any of such jobbers that some other jobber in competition with them was not maintaining such prices, and if upon making such investigation it found the fact to be as charged, it would put an end to such price cutting by refusing, if necessary for the accomplishment of that end, further to sell its product to that particular price cutter, and the jobbers or some of them did in fact so understand, and felt that they were entitled, when some jobbers in competition with them cut prices, to complain to defendant, and to expect that the defendant would take effective measures by refusing, if necessary for that purpose, further to sell to such price cutter to protect them against his competition, then you will be justified in finding that such a combination existed.

In determining whether or not there is a combination of the kind I have described to which the defendant was a party, and whether or not its refusal to sell plaintiff was in furtherance of such combination,

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you must not allow your judgment to be affected by any economic or business views you may hold, or as to any doubts you may have as to the wisdom of the law. If you went into that field you might have to go very far indeed. One of the great problems of modern days, perhaps of all days, is preventing waste in the process of getting goods from their original producer to the ultimate consumer. The problem is complex and difficult in the highest degree. Such questions can not be fought out in individual trials, for in the nature of the case there would be almost as many conclusions as there were different cases tried. You must apply the law as it is, and so far as you are concerned, the law as it is you must take to be as I say it is. If I am wrong as to what the law is, the Appellate Court will correct the error. If I am right as to what the law is and the law itself is an unwise one, Congress alone can change it. Under your oaths of office you must enforce the law as the law now stands.

If you shall find that defendant was a party to such an unlawful combination as has been described, and that it refused to sell plaintiff in furtherance of such unlawful combination, then you must next inquire what damages plaintiff actually suffered in consequence, and this you must find from the evidence. Now, the only damages which plaintiff has sought to prove in this case is the loss of profit it would have made on the grape juice which it wanted to buy from defendant, but which defendant would not sell it. It was about the beginning of March, 1912, that defendant stopped selling grape juice to the plaintiff. This suit was brought in May, 1915, some three years and two months later. The plaintiff had bought and sold in the year preceding its being cut off some 190 cases of grape juice. It is in evidence that plaintiff's general business has considerably increased in volume during those three years, and that the sales of Welch's grape juice, both in Baltimore and throughout the country, also largely increased during those three years. It will be for you to say, upon all the facts before you, what amount of Welch's grape juice plaintiff would have sold during those three years, if defendant had supplied it with such grape juice. After having determined how many cases the plaintiff would have sold if it could have obtained them, you will have to figure how much profit plaintiff would have made on each case it would have so sold. As to 90 of these cases, the evidence seems clear. Plaintiff did obtain 90 cases somewhere else, but at a cost of 40½ cents a case more than it would have paid if it had been able to obtain them from defendant. As to those 90 cases, its loss of profit, or its damage, whichever way you may choose to put it, would have been 40½ cents a case, or $36.45 in all, and the law requires you, after having ascertained the actual damages, to multiply those actual damages by three. Let me illustrate. Now, mind you, the figures I am giving you are for illustration only, and are not to be taken as any indication of any judgment of mine as to what the real figures ought to be. If, in one year, when the plaintiff could get Welch's grape juice, it sold 190 cases, in three years, if conditions had not changed at all, you may be able to

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find it would have sold 600 cases, and if, because of the increase in the total volume of plaintiff's business and the total increase in the sales of Welch's grape juice in Baltimore during those three years, you shall find that plaintiff would have sold a greater number of cases of grape juice in 1912, 1913, and 1914 and early 1915, than it did during 1911, and you reach the conclusion, say, that plaintiff would have sold 790 cases in that whole period, if it could have obtained them, then you deduct 90 cases from the 790 cases, because you know what plaintiff's loss was on those 90 cases, and put down \$36.45 as its loss on those cases. Then you determine what profit plaintiff would have made on the other 700 cases. If plaintiff had sold them at full list prices its profit, as I understand it, would have been about 67½ cents a case; that is, 15 per cent on \$4.50, which may be taken to be, I believe, about the average retail price of a case. The cash discounts are not taken into account because they were possibly given as well as received. Plaintiff, however, certainly did cut prices in some instances, perhaps in many instances, and it cost plaintiff something to do business. He testified that it cost him 5 per cent on the volume of his sales to do business generally, but the deprivation of grape juice made no appreciable savings in expenditure. How much deduction should be made for these various causes is for you to determine. Apparently plaintiff could make some profit even when he paid 40½ cents a case more for grape juice than the price at which defendant sold it to other jobbers. Assuming that you may think that he would have made 50 cents a case profit on these 700 cases, that would amount to \$350, and if you reach such conclusion as to that \$350, you would add \$36.45 and get a total of \$386.45, and then the law requires you, having ascertained that amount of actual damages, to multiply the figures by three, and that would result in a verdict of \$1,159.35. Again I repeat, these figures are given you not at all as any guide to what you shall find, but merely as an illustration of the way in which the verdict must be made out, after you find the detailed figures upon which the calculation must be based. Now, more than two years and two months have elapsed since this suit was brought. The law is not clear that the plaintiff is entitled to recover in this case any damages for what defendant has done since this suit was brought, even though those things so done are mere continuances of what defendant did before the suit was brought, so I shall instruct you, if you shall find for the plaintiff at all, after having calculated what your verdict should be for the damage done to plaintiff by the acts of defendant done before the bringing of this suit, to make a separate calculation and a separate return in your verdict of the amount of damage done plaintiff by that which defendant has done since the bringing of this suit. The calculation will be made, I assume, in the same way as you will calculate the damages resulting to the plaintiff from things the defendant did before the suit was brought, except that you will remember that since the suit was brought, plaintiff has bought 219 cases of

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grape juice at a cost of 40½ cents a case in excess of the price that other jobbers paid defendant, or $88.70.

If you shall find for the plaintiff under the first count, it will be unnecessary for you to give any attention whatever to the second count. If you, however, should find that the defendant was not a party to such a combination as has been described, or that the act of refusing to sell plaintiff was not done in furtherance of such combination, then you will have to consider the second count of the declaration.

That second count is based upon an offer made by the plaintiff to the defendant in March, 1915, to buy grape juice from the defendant at a price at which the defendant was selling it at the time to other jobbers, and upon defendant's reply that it would not sell it such grape juice, except at a price which is ordinarily charged retailers. Now this may very well have simply been a refusal to sell it, or at least that may have well been what defendant expected to result from such act on its part, but as it chose to give its action the form of discrimination, I presume it is not open to it to object that it did not mean what it said. Now this is important only in this: that in the second section of the Clayton Act, a discrimination of the kind forbidden by that act is an unlawful thing, whether there was any combination, in the furtherance of which it was made, or not. In order to find, however, for the plaintiff under this count, in addition to finding the discrimination you will have to find that the effect of such discrimination is substantially to lessen competition. Now a plan which is intended to eliminate competition in the price of a particular article you may well hold to be a plan which tends to substantially lessen competition, and if such discrimination is made in furtherance of such a plan, that is, a plan to prevent competition in resale prices, you may well hold that the discrimination will substantially lessen competition. If you find for the defendant on the first and for the plaintiff on the second count, your method of calculating damages will be precisely the same, except that your starting point will be the time at which the discrimination was made, to wit, January 18, 1915, and you can then allow damages to plaintiff only for the consequences of the continuance of the acts for the something less than four months preceding the bringing of the suit in this case, and from the date of the bringing of the suit to the present time. The method of calculating the damages would, so far as I can see, be precisely the same under the second count as under the first.

In bringing in your verdict, if you find for the defendant, generally you simply say, "We find for the defendant." If you find for the plaintiff on the first count, simply say, "We find for the plaintiff on the first count, and assess the damages up to the date of the bringing of the suit at ——— dollars, and the damages since the bringing of the suit at ——— dollars." If, on the other hand, you do not find for the plaintiff on the first count, but do find for the plaintiff on the second count, you will say, "We find for the plaintiff on the second

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count, and assess its damages up to the date of the bringing of this suit at ——— dollars, and since the bringing of the suit at ——— dollars."

In closing I shall say to you that while, as I have already said, the law you must take from me, you are the sole judges of the facts. I have discussed them, but what I have to say about them, or any opinion that I have intimated, or without intimating you may think or guess I have arrived at, should not in any sense be controlling upon you. Yours is the responsibility of passing on the facts. They are left entirely to your decision.

FREY & SON (INC.) *v.* THE CUDAHY PACKING COMPANY.[a]

(District Court, D. Maryland. May 25, 1917.)

[Not reported.]

MANUFACTURER MAY NOT INDUCE OR BRING ABOUT VIOLATION OF LAW.—No man may willfully and knowingly use his money, his industry, his brains, or his right to pick and choose among his would-be customers to induce or bring about a violation of law, or to do or procure the doing of some act which the law forbids.[b]

COMBINATION IN RESTRAINT OF TRADE NOT JUSTIFIED BY ITS BENEFICIAL EFFECT.—If a contract or combination be in unreasonable restraint of trade, the fact that in a particular given case the court or jury may think the result of a contract or combination may be on the whole beneficial rather than harmful, will not justify such contract or combination.

AGREEMENT FOR DESTRUCTION OF COMPETITION AND FIXING OF PRICES, VOID.—Any agreement having for its purpose the destruction of competition and the fixing of prices, is injurious to the public interest and void.

PARTY TO AGREEMENT TO FIX OR MAINTAIN PRICES LIABLE FOR DAMAGES.—No man has a right to be a party to an agreement or combination to fix or maintain prices, and one who does something to further such an illegal object is liable for damages to a party thereby injured.

At Law. Action by Frey & Son (Inc.) against The Cudahy Packing Co., for damages, for the refusal of the defendant to sell it Old Dutch Cleanser except at retail prices, because

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[a] For prior opinions (228 Fed. 209), see *ante*, p. 375; (232 Fed. 640), see *ante*, p. 383. For later opinion (243 Fed. 205) see *post*, page —.
[b] Syllabus by the compilers.

of its refusal to maintain the fixed resale price of its cleanser made by defendant. There was a verdict and judgment for plaintiff in the same of $2,139 for damages to date of suit; the court not allowing damages from date of suit to date of verdict.

Horace T. Smith, of Baltimore, Md., and *Daniel W. Baker*, of Washington, D. C., for plaintiff.

Washington Bowie, jr., of Baltimore, Md., and *Gilbert H. Montague*, of New York City, for defendant.

CHARGE TO THE JURY.

ROSE, District Judge.

Gentlemen of the jury:

As you know, gentlemen, this case is brought under the Anti-Trust Acts. Those acts forbid certain things, and they further say that if anyone is injured by the doing of some one of those forbidden things he may bring a suit at law to recover for the damage so done.

The plaintiff's amended declaration contains two counts. The first alleges that the prohibition against which the defendant is said to have offended is that imposed by the first section of the original Sherman Act which prohibits contracts, combinations, and conspiracies in restraint of interstate trade.

The second count sets up a breach of the second section of the Clayton Anti-Trust Act passed October 15, 1914. This section makes it unlawful for any person engaged as defendant was, in interstate commerce, either directly or indirectly to discriminate in price between different purchasers of commodities where the effect of such discrimination may be substantially to lessen competition.

I direct your attention to the allegations of the first count. I will not deal with more or less undisputed things alleged in the first count. The defendant is engaged in interstate commerce and the plaintiff is engaged in interstate commerce. These are matters which have been proved and are not in controversy here, so I will pass to the matters which are more vital because disputed more or less seriously.

The plaintiff says there was a combination in restraint of trade, inspired and brought about by the defendant, and to which defendant was a party. It says that the particular combination of which it complains was one to prevent any jobber from selling to a retailer Old Dutch Cleanser below certain prices designated by the defendant, and it says it was injured by an act done in furtherance of such combination, viz, by refusal of the defendant to sell to it Old Dutch

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Cleanser, because it had in fact refused to become a party to such combination.

Ordinarily no man has a right to complain because another man will not sell him something that belongs to that other man, nor does he ordinarily get any better right to complain merely because such other will sell to other persons the kind of things that the one complaining wants to buy, but will not sell them to the complainant. Of course, this rule is not universally true. As to certain sorts of services or accommodations, such as those of a common carrier, keeper of a public elevator, inn, a company that conducts a telephone or telegraph service, etc., in which one holds himself ready to serve the public, he must serve all the public, and may not for any arbitrary reason of his own refuse to serve any particular member of the public. But those cases are exceptional and have nothing to do with the ordinary sale of goods, wares, and merchandise. There, in the absence of any statutory prohibition, any man may pick and choose as he sees fit among would-be customers. I say in the absence of statute, because that is all that is here necessary to say. Whether under any circumstances Congress can constitutionally limit this right, it is not necessary in this case to inquire; but Congress has not done so, and, indeed, in its last enactment on the subject it says that nothing contained in the act shall prevent persons engaged in selling goods, wares, and merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade. Defendant has asked me to say to you—or at least I assume it argues, among other things—that it has an unquestioned right to stop dealing with a jobber for reasons sufficient to itself, and that it and any other manufacturer has an unquestioned right to deal with or stop dealing with any jobber who handles its product; and where it distributes its product through jobbers, upon whose methods of business it is largely dependent for the sale and distribution of its product, it has a right to choose the jobbers through whom it will sell and distribute its products.

Now all these statements are true. Defendant further asks me, however, to say that the reasons which influence a manufacturer in such cases to choose between jobbers, or to stop dealing with a particular jobber, are of no consequence. Ordinarily this is true. It is always true except under circumstances which I shall hereafter specify. The reasons why a dealer would have a right to decline to sell to a particular man, and should not be called on to explain or defend his actions in so doing, are obvious to everyone,—certainly to every business man. There are a great many such reasons. You may doubt the credit of some one who wants to buy from you. You could not prove that his credit was not good, and you would have no right to say to anyone that you did not think it was. Perhaps you could not define to yourself just what were the causes that led you to suspect his credit. Perhaps five times out of six it would have turned out you could have sold him safely, but the loss which you would in-

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cur on No. 6, had you sold him, would have been several times the aggregate profit you would have made on sales numbers one to five. And then, there are other men whose financial responsibility is unquestioned, but with whom you think it might not be well to deal. No matter how they get on with other people, you and they do not pull it off comfortably, and business relations between you and them you fear will never be worth while; and then there are others who can pay their bills and who do pay them when there is no way of getting out of it, with whom you do not want to deal. The sort of people who on a falling market always object that the goods are damaged, short in quantity, etc. Most of us come across some people whom experience has taught us it is well to keep clear of. After a while we come to the conclusion that if we lend them a dime on the collateral of a gold dollar we will have reason to regret it. Therefore the law is, and with some very few limitations, I presume always must be, that whether a man will sell another or not is a matter for the seller to determine for himself.

Absolute, or nearly absolute, as the right to select one's customers may be, it is doubtless no more absolute than our other rights, such as our right to use our capital, industry, and our brains to the best advantage. I take it, however, and I shall so instruct you that the law is, no man may wilfully and knowingly use his money, his industry, his brains, or his right to pick and choose among his would-be customers, to induce or bring about a violation of law; that is to say, to do or procure the doing of some act which the law forbids.

Now in this case, plaintiff says that the law does forbid any combination or agreement to maintain the price of any article. One must bear in mind what that contention is. It has nothing whatever to do with the right of the defendant to fix the price at which it will sell its goods to anyone. One of the principal purposes, perhaps one of the principal purposes of the Sherman Anti-Trust Act, was to prevent the growth of monopolies. Now there is in this case no question as to defendant's monopolization of cleansers. Plaintiff does not contend that it can not get cleansers, but its complaint is limited to the charge that it can not get Old Dutch Cleanser. The name Old Dutch Cleanser is a purely arbitrary one, I presume. It is a trade-mark under which defendant sells its cleanser. No one other than the defendant, apparently, has the right to manufacture an article and call it Old Dutch Cleanser. By the nature of things, therefore, defendant has a monopoly in the original production of Old Dutch Cleanser, because Old Dutch Cleanser, after all, means nothing more or other than the cleanser made by defendant. Defendant, being the lawful owner of the cleanser, may sell it at whatever price it can induce anyone to pay for it. But Congress has also prohibited combinations, contracts, or conspiracies in the restraint of interstate trade. That does not mean that all contracts or combinations which restrain competition are necessarily prohibited by

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statute. The statute itself is to be read, as the Supreme Court has told us, in the light of reason, but there are certain kinds of contracts and combinations which the Supreme Court, as I understand it, has held to be contracts in unreasonable restraint of trade, and if a contract or combination belongs to that class, the fact that in a particular given case the court or jury may think that the result of the combination or contract would on the whole be beneficial rather than harmful, will not justify it, and as I understand the decision of the Supreme Court, any agreement having for its sole purpose the destruction of competition, and the fixing of prices is injurious to the public interests and void. The sole purpose of the agreement or combination must be the fixing of prices. That does not mean that the parties to it may not expect, and, for that matter, reasonably expect, to derive various benefits from such fixing and maintaining of prices. It does mean that the sole purpose of the agreement itself is to maintain prices. Now, no one has a right to be a party to such a contract or combination, and one who does become a party to it has no right to do anything to further its object, whether the thing so done would or would not otherwise be within its clear right. One who does something to further the illegal object, and in so doing injures and intends to injure someone else, has done wrong, and if that something is done in the promotion or furtherance of a contract or combination in restraint of interstate trade, he has done something for which the person injured may require him to account in damages.

Now, clearly under this statement of the law, the defendant can not be held liable under the first count, unless it was a party to a contract or combination or conspiracy to fix and maintain prices. Defendant denies it was a party to any combination, contract or conspiracy for such purpose. It says it merely notified the jobbing trade what prices it thought were the lowest at which jobbers could resell its product and make enough return thereon to make it worth their while to push the sale of such product. It is admitted by the plaintiff that with reference to most of the jobbers, at least, there was no written and signed agreement on the subject and none couched in any formal or express terms, although it is in evidence that the defendant, suspecting the firm of Frey & Thomas, of York, Pa., of cutting prices, did ask them to enter into a formal written agreement to maintain prices, which draft of agreement has been offered in evidence; but in that case no agreement was actually formed because Frey & Thomas declined to enter into it and, according to the testimony of Mr. Thomas, they have not been able to buy Old Dutch Cleanser from defendant since, except at the price at which it was usually sold to retailers.

A number of jobbers here in Baltimore have testified that they have for years been purchasers of Old Dutch Cleanser from the defendant, and that they had entered into no agreement on the subject, and some of them, at least, testify that they did not feel under

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any obligation, either moral or otherwise, to maintain such prices. Many of them said that they always had maintained them, and some of them who so said did so because they would not have handled the goods at all if they could not have resold them at a figure at least as high as they received for them; and others give as an additional reason that they are in the habit of respecting manufacturers' wishes as to resale prices. Some of them say that they do not feel that they would be dealing quite fairly with the manufacturer or with their competitors if they did sell below the resale prices named by the manufacturer.

There is no question that the defendant from time to time issued circulars to the trade, in which such circulars appeared statements like the following:

"Our business, and especially the extension of the trade in these articles, depends mainly upon their success in the market, and we therefore consider it essential to make every fair effort to assure to each merchant a steady and reasonable profit. Uniform and fair jobbing and retail prices and trading provisions accomplish this, and we further expect by such uniform sales promotion to gain a practical benefit in increased business to ourselves, to the jobber, and to the retail merchant, and to merit their united appreciation, good will, and support."

And then in rather prominent type:

"In relation to wholesalers supplying one another. Important. It is the intent of our selling provisions governing distribution from jobbers' stock (or drop shipments from factory for account of jobber) that the prices provided for different quantity lots, are to govern without exception. If wholesalers should sell other wholesalers or distributors at an intermediate price between jobbers' cost and the fixed retail price, special prices might thereby gradually be extended to semi-jobbers, to the ultimate restriction of our business. Any sales by jobbers at special prices would have no other effect than to enable the purchaser, whether jobber, large retailer, or otherwise, to demoralize prices and disturb the entire business in these products. To prevent this [and the following appears in red type] it is therefore essential that we be the only ones to decide who is to buy at wholesale prices [there the red type ends], and it is for that reason the jobbers' sales to other jobbers and distributors should be strictly at our published retail list or, in other words, at the same price at which the jobber would sell to any retailer. This is a matter of so much importance that we deem it essential to bring it prominently to your notice by this means."

And then in red type in the same circular appears. "Old Dutch Cleanser and Dutch Hand Soap will be sold at jobbers' prices to only such jobbers as strictly observe the retail selling prices in this list in all of their resales, whether to their regular retail trade or to other jobbers and distributors."

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The quotations I have made are in evidence in the circular dated October 1, 1912. There is another one in evidence dated January 1, 1910, but it appears in respects mentioned to be substantially, I think, verbally identical with the one of October 1, 1912. These quotations are from a circular which is called "Selling Price to Retailers." The same notice appears in a circular marked "Jobbers' Cost" issued by the defendant under date of January 1, 1910. On April 6, 1914, there is in evidence a circular issued by defendant and called "Distributing Agents' Compensation." In this circular it is stated:

"For the most practical and economical merchandising and distribution to the trade we appoint distributing agents, the same being taken from business houses doing exclusive jobbing trade. To insure the availability and success of their work, and of our important and constant national advertising, as well as in the interest of the trade, uniformity and equality as to terms, delivery, and price is essential. It is, therefore, required of our distributing agents that they fully coöperate with us in this direction, as per terms, conditions, and prices laid down in our published General Sales List. The goods that we deliver to our distributing agents are for sale to our mutual retail trade, and is not intended that our distributing agents sell same to other wholesalers, as we are prepared to distribute through them in all cases on the terms and conditions of our published Sale Provisions. We especially desire to point out that this remuneration to our distributing agents may not be given away by them, wholly or in part, to any class of trade, either jobbers, semi-jobbers, retailers, or consumers. All quotations, bids, sales, and invoices should be at a rate not lower than laid down in our published General Sales List. Quantity orders should not be booked or deliveries made, excepting to one buyer at one time, and distributing agents should not entertain orders where pooling is known or probably exists. Discount: Not more than two per cent for cash for remittance received within the cash discount period should be allowed. Cash discounts should not be allowed from quotations, bids, or orders, nor should it be deducted from invoice on the assumption that the customer will pay cash."

There can be, of course, no question here that the defendant did all that it could do to make dealers believe that it would refuse to sell them except at the price at which any retailer could buy, if they did not in all respects maintain the price list that it fixed, and it is in evidence that it did refuse to sell jobbers whom it believed were not maintaining these resale prices, and on every bill sent to a wholesaler by the defendant there appears to have been stamped a notice that "All your quotations, bids, sales, and invoices for Old Dutch Cleanser, either to jobbers, semi-jobbers, retailers, or consumers, should be at a rate not lower than laid down in our published General Sales List."

I should say a word here, perhaps, about the phrase "distributor" which appears, some time between October, 1912, and April, 1914, to

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have been substituted by defendant in advertising literature for the phrase "jobber." So far as the testimony has disclosed, and so far as any of the jobbers who have testified are concerned, the change was a change in name only. The goods were sold to so-called distributing agents just as they had been sold to jobbers, and I do not think you need pay any attention whatever to such a change of name. It further appears from the testimony that defendant did sell its goods to substantially all the wholesale grocers of Baltimore. There were a very few exceptions, and the reasons for them you have heard. It sold for years to the plaintiff, and it stopped selling plaintiff at the prices at which it had been selling to plaintiff and at which it continued to sell to the other jobbers in Baltimore to whom it had previously been selling, and it is perfectly clear from Mr. Frey's testimony, and from the correspondence that passed between him and the defendant's agents, that no other complaint was made against him except that he had cut the resale prices. You may reasonably conclude that if there had been any other reason whatever for cutting him off, defendant would have offered evidence to show the existence of such reason, but none such was offered. I think you will be entirely justified in finding that the refusal to sell, if you shall find a refusal, or a discrimination against Frey, if you regard what the defendant did as a discrimination rather than a refusal, was due entirely to defendant's belief that Frey had cut the prices and was likely to continue so to do. If you shall find that the plaintiff was cut off and that the reason for defendant's refusal to sell it at less than the price at which sales were made to retailers, was his cutting of prices, you will have to inquire whether such action was taken by defendant in furtherance of the combination to maintain resale prices, if you shall find the existence of such combination. If one large wholesale jobber cuts prices on any considerable scale, quite obviously his competitors, the other wholesale jobbers, will have to do the same or cease to deal in the article. If there was any such combination, you may hold that it was necessary for its maintenance that defendant should in some way stop any large jobber from cutting prices, if it could, and you may, therefore, have little difficulty in holding that it was for the purpose of maintaining the resale prices fixed by it that it dealt with the plaintiff as it did.

In point of fact, there seems to be little room for controversy as to this first count on any possible question, except whether there was a combination, and as to whether what the defendant did with reference to Frey was a refusal or a mere discrimination. I can only say to you that if you shall find that the defendant indicated a sales plan to the wholesalers and jobbers, which plan fixed the price below which the wholesalers and jobbers were not to sell to retailers, and you find defendant called this particular feature of this plan to their attention on very many different occasions, and you find the great majority of them not only expressing no dissent from such plan but actually coöperating in carrying it out by themselves selling at

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the prices named, you may reasonably find from such fact that there was an greement or combination forbidden by the Sherman Anti-Trust Act. Of course you understand that the plaintiff must make out its case, and must satisfy you by a fair preponderance of the evidence that its case is made out, and if your mind on any issue in the case necessary to your determination is left so in doubt that you do not feel that the evidence preponderates on one side or the other, the defendant must have the benefit of it.

In this case, however, there is not so much dispute as to ultimate facts, perhaps, as there is to the inference which can reasonably be drawn from the facts. Now the defendant says it never did refuse to sell plaintiff. It certainly did always offer to sell him Old Dutch Cleanser at the price at which, according to its sales plan, wholesale grocers like himself resold the Old Dutch Cleanser to retailers or other persons. Plaintiff says that was intended to be a refusal, and in fact was so. Quite clearly if defendant had said to the plaintiff that he could have Old Dutch Cleanser at $5 a case it would have refused to sell him because it would have known perfectly well that the plaintiff could not pay such a price for that article to sell again, so that there may be a refusal which takes the form of the naming of a price, which the person naming it knows to be prohibitory. Now in this case defendant did offer to sell plaintiff Old Dutch Cleanser at a price at which, buying in large quantities, it could, if it had sold in very small lots, have made some profit, for the reselling price to retailers in one case lots is $3.40 and in over 250 case lots it was $3.20, which latter price was that which defendant quoted to plaintiff. It will be for you to say, under all the facts and circumstances of the case as they are in evidence, whether you believe that the defendant in naming the price it did to plaintiff desired and intended to prevent him from obtaining goods, or whether it merely sought and intended to get from him a higher price for its goods than it was willing to sell them for to other persons in like case. If you think its purpose was to keep him from getting the goods, it was a refusal. If you think its real purpose was to sell him the goods, but at a higher price than it charged others in like cases, it would be a discrimination.

If you shall find a refusal in furtherance of a combination to maintain prices, you should find for the plaintiff under the first count, and it will then be unnecessary for you to give any attention to the second count.

I should say, and perhaps I have already said it, that a combination, contract, agreement, conspiracy, or whatever you choose to call it, does not have to be made in any formal way. If you know that I want you to do something and you know I will not deal with you unless you do that something, and you keep on doing it, there may be an agreement between us to do that very thing, though never a word has been said. In other words, you will understand that if the persons were acting deliberately, each knowing the purpose of

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the other, actually coöperating and working together to obtain the same result, then you can find that the agreement, or whatever you choose to call it, existed.

The second count charges the violation of the Clayton Act, which makes it unlawful for any person engaged in commerce in the course of which commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities, where the effect of such discrimination may be to substantially lessen competition, or tend to create a monopoly in any line of commerce. There is no question that defendant did charge plaintiff more for Old Dutch Cleanser than it charged others in like line of business with plaintiff, and if you shall find, as from the evidence you may very well find, that the intent of such discrimination was to maintain the resale prices fixed by the defendant, you may well find that the effect of such discrimination was to substantially lessen competition, as you may find in view of the repeated warnings given by defendant in its literature that the discrimination against plaintiff would operate to make other jobbers and wholesalers fearful to indulge in any competition in price in this article.

If you shall find a refusal in furtherance of a combination to maintain prices, you should find for the plaintiff under the first count, and it will then be unnecessary for you to give any attention to the second count. In determining whether or not there is a combination of this kind I have described to which the defendant was a party, and whether or not its refusal to sell plaintiff was in furtherance of such combination, you must not allow your judgment to be influenced by any economic or business views you may hold or any doubts that you may have as to the wisdom of the law. If you went into that field, you might have to go very far indeed. One of the great problems of the modern day, and perhaps of all days, is preventing waste, in the process of getting goods from their original purchaser to the ultimate consumer. The problem is complex and difficult in the highest degree. Such questions can not be fought out in individual trials, for in the nature of the case there would be almost as many conclusions as there are different cases tried. We must apply the law as it is, and so far as you are concerned, the law as it is you must take to be what I say it is. If I am wrong as to what the law is, the Appellate Court will correct the error. If I am right as to what the law is, and the law itself is an unwise one, Congress alone can change it. Under your oaths of office you must enforce the law as the law now stands.

If you shall reach the conclusion upon a preponderance of the evidence that the defendant was a party to such combination and that to further its object it refused to sell the plaintiff Old Dutch Cleanser for such purpose, then it will be your duty to inquire what damage plaintiff actually suffered as a result of such refusal. If plaintiff had been able to obtain Old Dutch Cleanser from the defendant at the price at which other persons in like line of business in Baltimore

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had obtained it, the evidence indicates that he would have been able to have resold it to his customers at a profit. He lost that profit because he could not get the product from defendant, or lost part of the profit because he could not get it at a price as low as that paid by others. Now, how are you to determine how much Old Dutch Cleanser the plaintiff would have sold if he had had the chance to sell any? Well, during the three years preceding the time at which defendant took plaintiff off its preferred list, as it calls it, plaintiff had bought and substantially sold some 6,658 cases, or an average of over 2,200 cases a year. The total volume of its business in all lines during that time averaged something like $1,300,000 a year, and during the period intervening between the time defendant took the action complained of and the institution of this suit, defendant was doing a business of perhaps one and a half million dollars a year. You may not unnaturally conclude, in view of the high public favor in which the evidence seems to show that Old Dutch Cleanser is held, that plaintiff's sales of Old Dutch Cleanser would have increased proportionately to that of the rest of his business. That is to say, that if it sold something in excess of 2,500 cases a year of Old Dutch Cleanser, you may find that during the period elapsing between the cutting off and the bringing of this suit, it would have sold somewhere upward of 3,000 cases, and if you shall so find—and you are not bound to; it is entirely in your sound business judgment—you will have to determine what profit plaintiff would have made on such volume of business. He paid about $2.95 a case for it, less 2 per cent discount. There were some 103 cases which he resold at practically no profit, and he claims he sold most of the other 6,653 cases at $3.40 a case. He admits that there was some cutting. He thinks it was made with only five customers. He is not able to tell what quantity these five customers took. As to them, it was sold as low as $3.15. He has said he sold almost exclusively in 1-case lots, but defendant has produced a large number of orders which tend to show that he may be mistaken as to the small proportion of 5-case lots ordered by his customers. However, that may be, the testimony would seem to indicate that his average profit on what he sold was not more, and you may think if he had been able to obtain it, would not have been less than 20 cents a case, which on 3,000 cases, which you may estimate as the quantity he would have sold between the time he was cut off and the bringing of this suit, if he had had the chance to make such sales, would be $600. If you think that he would have obtained a higher average profit, you will increase the estimate of his damage accordingly. Of course if you think his profit would have been smaller, you will cut it down. After you have ascertained the actual damage, the law requires you to multiply it by three. If, for example, you find that the plaintiff's actual damage was $600, and decide that he is entitled to recover therefor, you multiply that $600 by three, and return a verdict for $1,800.

Syllabus.

This suit was brought in May, 1915, two years ago. Plaintiff thinks it is entitled to damages not only for the period before the suit was brought, but for these two years. The question of law is a close one and I shall ask you therefore in your verdict, if you shall find for the plaintiff, to find that its damages up to the date of the bringing of the suit were so much, say for illustration $1,800, but only for illustration, and that for the two years since the bringing of the suit, in which time you will find he would have sold between five thousand and six thousand cases, that his damages were so much. In each case, you understand, you first ascertain what the actual damage is, and multiply it by three.

Now, gentlemen, while you are to take the law from me, there is a tribunal in Richmond, and ultimately in Washington, that corrects the very many blunders in the law that we judges down here make. On the law I am speaking *ex cathedra* now and for your purposes I am infallible. But on all questions of fact you are the sole judges. If I have intimated any opinion upon the facts in this case those opinions are not binding on you except in so far as they commend themselves to your judgment. The facts are entirely for you to decide, and the responsibility rests upon you.

LOWE MOTOR SUPPLIES COMPANY *v.* WEED CHAIN TIRE GRIP COMPANY, AND MOTOR CAR EQUIPMENT COMPANY.

(District Court, S. D. New York. May 5, 1917.)

[Not reported.]

SHERMAN LAW—DAMAGES RECOVERABLE UNDER FOR VIOLATION.—In an action for damages under the Sherman Law, the damages recoverable are the loss of profits that would have been made if the plaintiff had been permitted, as freely as the law says he should be permitted, to get his supply of goods to meet the needs of his customers.[a]

MANUFACTURER CAN NOT CONTROL RESALE PRICE OF HIS PRODUCT.—A manufacturer can not, under the Sherman Law, control the resale price of his goods, whether they be protected by a trade-mark, a copyright, or a patent, or not, and whether sold by a jobber or by a dealer.

PATENT DOES NOT GIVE OWNER THE RIGHT, AFTER SALE, TO FURTHER CONTROL PATENTED ARTICLE.—The monopoly to sell, granted by the patent law, does not give the owner any right, after he has once sold a patented article, to control its further disposition, because it is a patented article, any more than if it was not a patented article.

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[a] Syllabus by the compilers.

Charge to the Jury.

At Law. Action by Lowe Motor Supplies Company, against the Weed Chain Tire Grip Company and the Motor Car Equipment Company, for damages sustained by reason of the refusal of the defendant companies to furnish plaintiff Weed tire chains, defendants having entered into a combination to fix and control the resale price of such chains, plaintiffs having failed to maintain the prices so fixed.

There was a verdict for plaintiff in the sum of $12,000.

Louis Vorhaus, counsel for plaintiff.

Charles T. Terry and *E. W. McMahon*, counsel for Weed Chain Tire Grip Company.

Charles A. Taussig, counsel for Motor Car Equipment Company.

CHARGE TO THE JURY.

MACK, Circuit Judge.

Gentlemen of the Jury:

We are now reaching the conclusion of a rather long-drawn-out but important case. You have been very patient, you have given the most careful attention both throughout the evidence and throughout the arguments of counsel; and counsel on both sides have very ably marshaled before you the evidence in the case as each of them views it, to his own interest, of course. That is natural, and it is the duty of counsel. But, both have summed it up in such a way as to make it unnecessary, I believe, for me to attempt again to review the facts in the case.

It is my duty primarily to charge you as to the law which shall control you in your consideration of the evidence, and what I say as to the law must be accepted by you as sound. I may err. If I err, there are higher courts that will correct me; but for the present my statement of what the law is must be your guide in applying the law to the facts. If I say anything as to what the facts are, or as to what conclusions the facts in the case lead to, that is only an expression of my personal opinion, and that personal opinion of mine as to the facts is not binding upon you, because, under our system of the trial of cases of this kind, it is for the jury to determine what the facts in the case are, and it is for the court to say what the law is. I am permitted to present to you a view of the facts. I am permitted to go

further—I am permitted to express to you my opinion as to the facts, but in that respect, if I do in the course of what I may say, express any opinions on those questions, they are only opinions and are not binding upon you.

Now, there are one or two matters as to which my attention has been called in the latter part of Mr. Vorhaus' address to you, to which no exception was taken at the time, but it is proper enough to say that there isn't any evidence in the case that Mr. Sparks had been in this court room; and there isn't any evidence in the case that Mr. Morris was available. The statement that he was in the court room, as well as the statement on the other side that he had just come over from Philadelphia, are neither of them evidence in the case.

I mention this because I am asked to do it, and very properly asked to do it, because your decision as to what the facts are must be based upon the evidence before you; and when I say it must be based upon the evidence before you, that is both positive and negative. The positive evidence before you are the statements of the witnesses and the documents that have been offered and have been admitted into evidence; but there is also a negative kind of evidence which the jury always has the right to consider, and that is, the failure, if there is any failure, on the part of any party to produce witnesses or to offer testimony as to why they were not produced; and if the evidence that is before you tends to make it appear to you that witnesses might have been produced and might have given helpful testimony, and were not produced, you have a perfect right to consider that fact, because it is a fact in the case, in its bearing upon the evidence that was produced. As, for instance, if one witness testified to a conversation, and the matter is of importance, and the conversation is not denied, and there is nothing in the evidence to show that a witness who might have denied it could not have been brought forward to deny it if it were untrue, you have the right, not the duty, but the right, to consider the fact that such a witness was not brought forward, and no explanation offered for his not having been brought forward, as bearing upon the question of whether the witness who testified to that conversation told the truth or not. Now, I do not mean to say that because a conversation is testified to, and because the other party to the conversation is not brought forward, or if brought forward has not been asked and does not deny the truth of the conversation, that therefore you must consider the conversation true. Such testimony, while strengthened by this circumstance, is to be weighed by you like all other testimony in the case. To put it by a further example: One of the most serious questions that a jury has to consider when there is a conflict in any testimony is, Where does the truth lie in that conflict? In other words, What we call the credibility of the testimony. Well, now, there are many guides in determining that

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credibility. Naturally, you ask yourselves first, "Is it inherently probable that this is true?" Or is some explanation that is made to show that some mistake was made, say in some written statement, is that explanation inherently probable? Or, how does the man appear when he is testifying? Does he give the appearance of frankness such as would lead an ordinary man to believe that he is endeavoring to tell the truth? Or does he give the appearance of evasiveness? Does he act on the stand as if he is trying to hide something? And, even that again is subject to explanation. A man may, because of his very nature, give a false appearance. Some men are extremely dull, and when they appear on the witness stand you may think at first that they are shifting, and that they are hiding, and that they are trying to conceal something, and yet the entire testimony may satisfy you that the man is not really trying to do that at all, but that he is dull, or that he is a fool, or that he is excited, or what not. And, so also, a man may on a particular day have had experiences, accidents or what not, that may cause an excitement at the time that may make his appearance really unjust to himself. All those things, all those human elements are matters for the jury, which they have a right to take into consideration, and there are a good many others still, in determining whether a man is telling the truth, whether or not one is mistaken, or whether, on the other hand, one or the other is deliberately lying.

Now, of course, it is humanly possible for two men to go out on the street, and an accident happen, and one man, because of his human endowments, may see every little thing that happened, and another man may only see one-tenth of what happened. Then both of them may come on the witness stand, and one may testify to all the things that happened, while the other may say, "I didn't see that; I don't believe it is true"; and he may even say it didn't happen, because he didn't see it; he thinks it didn't happen, and he may be absolutely honest. In other words, those are the possibilities of human fallibility in observation and in testimony, and it does not follow necessarily, because there is a conflict in testimony, that either party has deliberately lied. But, on the other hand, it does often happen in the trial of cases, and particularly where there is a conflict in the testimony, and particularly where it is not a matter of observing a hundred things, but of some specific thing, that one or the other is deliberately lying about it. If you should come to the conclusion in this case that any witness has gone on the stand and has deliberately, knowingly, and willfully testified falsely to some material matter in a case, you have the right—you haven't got a duty—you can weigh the thing again, but you have a right to disregard everything that that man says, to treat him as an unmitigated liar, if you believe that that is so.

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Now, there is no absolute rule of law, as you see, about these things. These are only human guides. I am only really trying to point out to you some human psychology in helping you to judge the testimony of each of these witnesses.

Another element that enters into human testimony is the interest that a man has in the outcome of the case, and one's interest may unconsciously affect his testimony; it may unconsciously affect his memory. And it may consciously affect his testimony or his memory. Now, you have seen these witnesses except those whose depositions have been read. You, as men of affairs, must make up your minds, taking these and any other guides that you think fair and proper in sizing up what each one said; and you must come to the conclusion from that where the truth lies, both in the case of conflict and even where there was no conflict, because the fact that a man is uncontradicted as to anything or everything does not bind you, of course, to accept what he says as true.

As I said a few minutes ago, if you consider that that man, uncontradicted as to a good many things, has deliberately lied to you as to some important thing, then you can waive aside the things as to which he is uncontradicted, if you think that those things are not true, from your consideration of the entire case.

I emphasize these matters because there are conflicts in this case that have got to be resolved. They have been marshalled before you by the attorneys, and it is up to you to consider the degree of credibility that you are to attach to the sayings of each one of these witnesses.

Of course letters written in the due course of business transactions, and without any evident purpose of preparing for a law suit, are more faithful recorders of what has been going on at the time than the human memory. If a man writes a thing out and hasn't any purpose to color the transaction at the time, and there is no obvious motive at the time in lying, that is ordinarily pretty good evidence of what it recites. Then again, where there is conflict between writing and oral statements, memory, you have the right in weighing the matter to consider that fact. Now, of course, on the other hand, men frequently use the written word not to express but to conceal thought. Men put something in writing very often in order that they may afterwards say, "Why, see here, this was my understanding, or our understanding," whereas really they didn't have any such understanding at all. They were merely creating lies. That also is a factor to be considered by you in determining whether writings really express understandings of both or either party, or whether they are mere subterfuges.

Now, after you have considered the evidence in the case in the light of this question of the credibility of the witnesses, and based on that have reached or endeavoring to reach conclusions as to what the facts in the case really are, there is one important rule of law that affects most seriously the verdict. That is this: What we in law

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call the burden of a case is on the man who brings the case. This Lowe Motor Supplies Company comes into this court, and it makes certain charges against these two defendants, and it asks you first to say that the defendants are guilty, and second, to say that through those acts the Lowe Motor Supplies Company has been damaged, and thirdly, to say as nearly as you can estimate it as it is not a matter of mathematical certainty, how much they have been damaged.

Now, suppose when you have weighed all the evidence you say, "These scales weigh about evenly; we don't know whether the defendant is guilty or not." Now, the law has got to say what you shall do under those circumstances; it has got to lay down some rule, because you can not simply come in here and say you don't know whether they are guilty or not. Of course it is your duty to make every endeavor honestly to come to an agreement, because after all these days of trial it is a serious matter for a jury to disagree. I do not mean to say by that that even if one of you has an absolutely compelling conviction that the other eleven are all wrong, and that he can not in conscience join with them, that it is his duty to deny his own conscience. Of course that is not your duty, but it is your duty to give heed to the arguments of your fellows in your consultations, to carefully consider what the others have been led to believe by the evidence, to recognize the importance of juries coming to some conclusion one way or the other based on the evidence, and not from mere obstinacy to stand out for a position when reason says, "In all probability my colleagues are right, and I cannot say that my conscience compels me to say that they are wrong."

Now, passing that point of disagreement among yourselves, and assuming that after the arguments between yourselves and the consideration of the entire case, you as a jury say, "Well, we doubt; the scales weigh evenly; we don't know whether they are guilty or not." Then the law lays down the rule that guides you, and you must find that they are not guilty. Now, that may seem to you more or less arbitrary, but the reason back of it is that the plaintiff comes in here and he asks something positive. He asks that a defendant shall pay up for some wrongs done, and he must prove that they have done the wrong, and therefore if you are in doubt on the conclusions you have to say to the plaintiff, "You have not proved that the defendants have done this injury, and therefore we can not give you anything." The form of saying that you can not give him anything is the same as the form where you are convinced that the defendant is right, namely, you must find for the defendant. So, if you come to the conclusion that the defendant is not guilty of the charge made against him, or if the thing weighs evenly in your minds as to whether they are guilty or not, then it is your duty to bring in a verdict of not guilty. But, on the other hand, if you believe, after weighing all the evidence, that the weight of the evidence is in favor of the plaintiff, if the scales on which you have put all this testimony, all this evidence, as I said before, the positive and the

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negative, the actual and the absent, if those scales tip down in favor of the plaintiff, no matter how little they tip, then it is your business to find the defendant guilty. I say no matter how little they tip. In different kinds of cases we have different rules, and I emphasize this because some of you gentlemen may have sat in criminal cases. Before you can find a man guilty of a crime in a criminal case a jury must be convinced beyond a reasonable doubt that he is guilty. It is not merely that the thing turns evenly in their minds, and then they find him not guilty; it is up to the Government and the State, in cases of that kind, to take away all reasonable doubts that the jury might have. Now, that is not the rule in a civil case, and even if a civil case is based upon a charge of illegal acts, the case is not a criminal case because of that; the case is still a civil case, whether it is illegal acts or whether it is negligence, or whether it is a breach of contract, or anything else. In a civil case on a question which will result in damages, and not imprisonment for a crime, or a fine for a crime, the plaintiff must not satisfy you beyond a reasonable doubt, but the plaintiff must satisfy you by the weight of the evidence. That is, the scales must turn in his favor before he can win, and if they do not turn in his favor, if they turn in favor of the defendant, if they hang evenly balanced, plaintiff loses—and that applies not only to the question of whether the defendant is guilty or not, but it applies also as to whether the plaintiff has been damaged by those wrongful acts.

The charge here is that these defendants had coöperated, joined together, technically conspired to commit acts that our law forbids, and which, therefore, are illegal; that is, unduly to restrain interstate commerce, and by reason of that undue restraint of interstate commerce, which the plaintiff charges the defendants to be guilty of, the plaintiff has been damaged. Now, it does not make any difference, in the final result in this case, whether the defendants have or have not been guilty of restraining interstate commerce, unless this plaintiff has been damaged by any such restraint, because, as I said before, this is not a criminal case by the United States Government to punish them for unduly restraining interstate commerce. The Government has a right to try that question in a criminal proceeding or in other proceedings, if it wants to; that is up to the Government to say; but just as the Government has the right to test that question in the courts, and to secure punishment if a jury finds the defendant guilty of that crime, so, under the law, any private individual who is injured by such undue restraint of trade has a right to bring a civil action, and he has a right to bring a civil action that is a little different from ordinary civil actions. Ordinarily if a man hurts you, injures you, whether he breaks a contract with you or whether he is negligent and you are injured by his negligence, or what not, ordinarily all that you can recover are the actual damages that you suffer. But this is a peculiar kind of an action, because the statute expressly says, if the defendants are guilty and if you have suffered damages,

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and if you prove to the jury what those damages are—and I will come to the question of how you are to determine that later on—then it is the duty of the jury to give you three times the amount of the actual damages that you have suffered. But the point that I am on now is that the plaintiff must satisfy you, by turning the scales in his favor, that these defendants have unduly restrained interstate commerce, and they must satisfy you, secondly, again, by turning the scales in their favor, as I pointed out to you before, that they have been injured, materially injured; I mean injured in a money way by such guilty acts if you find that they have been guilty of the acts; and, thirdly, the plaintiff must satisfy you, again by the weight of evidence, what his damages are. Now, of course, that does not mean that he has to figure out to a penny just what he has lost; it does not mean, on the other hand, that unless there is some basis in the evidence from which the jury, as reasonable business men, can make a reasonable calculation, that they have a right to give a pure guess and say, "Here, this defendant is guilty, plaintiff clearly has been damaged, we will just give a guess as to how much these damages probably amounted to"; that would not be performing your duty. You do not have to mathematically be able to figure out, but you have to, as reasonable, common-sense business men, be able to say, in all probability, to this extent, at least, the damages are so much; and in a case like this, if you get to that question—and of course you won't get to that question until you first say that the defendants are guilty and the plaintiff has been damaged—if you get to that question the damage that is charged is the loss of profits that would have been made if the plaintiff had been permitted, as freely as the law says he should be permitted, to get his supply of chains to meet the needs of his customers.

There are a number of elements that enter into that calculation: First, what is the reasonable needs; what in all probability were the reasonable needs of this business during the period within which, if you find that there was any such period, they were, by the defendants' wrongful acts, if you find that the defendants committed the wrongful acts, prevented from getting the chains.

As I said before, the ultimate facts are for you to determine, but let us assume that you find that the defendants were guilty and that, by their methods, the plaintiff could not get the chains that he needed, say, from December 1, 1913, to the date of this suit, October 13, 1915. Of course, it is impossible mathematically to demonstrate how many chains he could have sold during that time, but there are various guides which you may consider in determining the probablities. You may take into consideration the business as it had existed and had grown, say, from 1910, down to December 1, 1913; you may consider how not only the chain business had grown, but the entire business had grown; you may consider what the proportion of the chain business was to the entire business, say in 1913 and in 1912; you may consider how the entire business had grown after December 1, 1913, and

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from that time on down to the date of the trial; you may consider whether or not, and form your own conclusions, in all probability the chain business would or would not have grown in the same degree, or in some other degree, or whether, because of any difficulty in getting enough chains, it might not have grown as much during the particular part of that period. These are elements in the evidence on which you could base a calculation as to what, in all probability, the chain business of this plaintiff would have been during that period.

Then there is the second element, how much profit they could have made. The profit that a man makes in his business depends ultimately upon at least two factors, namely, the gross profit—that is, the difference between the actual cost and the actual selling price of the particular goods—and the general expense attached to the dealing in those goods, to the securing of them, to the handling of them, and to the disposition of them. It is for you to say, from the evidence, if the opportunity to secure these goods in the open market, to the extent that the law says the market should be open—and I will come to that later on—had been given to this plaintiff, how much it would have had to pay for the goods. Would the plaintiff have had to pay the list price less 40, 2, and 5? Could they have gotten all they wanted at that time? Would they have had to pay the list price less 40 and 2? Could they have gotten all they wanted at that price? Would they have had to pay the list price less 33⅓ and 2? Could they have gotten all they wanted at that price, or was there some intermediate price at which they could in all probability have gotten what they wanted, or was it some higher price which they would have had to pay to have gotten what they needed in their business? As I say, I will discuss the legal questions which bear on that later on; I am now only going into the method of determining the damages, if you should reach that point; but, of course, the question of what they would have had to pay to get their supply if the market had been as unhampered as the law as I shall give it to you hereafter may have required it to be, will necessarily be the first element in considering what their gross and what their net profit, if any, would have been.

The second element that would have to be considered would be what they would have sold these goods at. Now, of course, they could have sold them at whatever they pleased, but that is not the point. They were in competition with the rest of the world, and that, in and of itself, puts a limit on the sale price naturally; and they were in competition with the rest of the world, which had practically established certain discounts, depending upon the character of the business that was done. The general custom, as you heard, was to give 33⅓ per cent off to dealers when they bought in quantities of a dozen or more, and 25 off to dealers when they bought in lesser quantities, and list prices when they were sold ordinarily at retail; and even then a good many people, as you heard, were accustomed to give chauffeurs a commission, and whether that is right or wrong, proper or improper, is not the question now. The ques-

tion is, what these parties were doing and how it would have affected the net business result, the net money result. Now, it may be hard to say what these parties would have bought them at and what they would have sold them at, but you have some guides in the testimony on which you can do more than guess, on which you can or you may be able—I don't say you necessarily can, it is for you to say whether you can or not—but on which you may be able to base a fair and reasonable estimate.

They have said that people outside of New York—some of them, at least—were ready to give them goods at 40 per cent off. There wasn't anybody, so far as I remember the testimony, that was ready to give them more than 40 and 2; there was nobody ready to give them 40, 2, and 5. So that the best they were able to secure from anybody was 40 and 2.

Now, based on the testimony, it is for you to say whether they could have supplied all their needs in that way; whether anybody would have, as a business transaction, for the sake of the 5 per cent, if he was getting 40, 2, and 5, been willing to sell to a big customer at 40 and 2 if he was unhampered in his selling. If you believe that these people who were getting 40, 2, and 5 would have been and were, based on the evidence, entirely willing to sell a customer like the Lowe Company at 40 and 2 and let Lowe pay the freight, then of course that would have been the price at which he could have secured them. If, on the other hand, you believe from the evidence that in as unhampered a condition of the market as the law may require, he would have had to pay 33⅓ off, or 33⅓ and 2 at least for a part of his goods, and for such part as you may believe he would have had to pay that for, then that would be the determining purchase price which would enter into your calculation, and so on, based on the evidence that has been presented to you.

Now as to the selling price, you have had not exact figures, but estimates; you have had estimates, first as to the relative percentages of the wholesale business, of dozen lots and less than a dozen lots, and of the retail business as it had been in the past and as it was in other things during the period in question. It is for you to say whether, in your judgment, those estimates are fair and proper or not; whether the party who testified to them, or the parties were really competent to judge; and whether, in your judgment, they made an honest estimate or whether they did not. But to the extent that you believe that they made an honest estimate, or to the extent that, based on the figures of the past, you yourselves feel that you can give a fair proximate judgment as to the probabilities during the period in question, if the market had been in as unhampered condition as the law required, you would have a right to make the estimate as to what would have been realized from such an amount of purchase as reasonably could have been obtained and have met the needs of this business and then, subtracting one from the other, you would

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have gotten the gross profit, if any, that in all probability they would have made.

So then, in determining whether, after finding a gross profit, there is anything left, you would again have to consider what the expenses in the business were. Of course, as you know, some men sell their goods for more than they pay for them, and at the end of the year they haven't anything left except a minus quantity; that is because the cost of conducting their business is greater than the difference between the purchase price and the selling price on the articles. Those men go to the ground pretty quickly. On the other hand, the man who is successful gives only a part of that difference between the cost and selling price to the so-called overhead expense; that is, to the general expense in conducting his business, and after he has done that, whatever he has left is his profit.

Now you heard what the profits were during this period and the preceding period, and you heard an estimate of what in the judgment of the witness would be a fair proportion of overhead expense to be charged against the chain business; and you heard the reasons why, in his judgment, the chain business should not be charged with its pro rata part of the overhead expense but with only 25 per cent of its pro rata part. As I said at the time the evidence was admitted, the question is how much any one department in a business, or any branch of a business ought to be charged with the general expenses of that business, if for any reason you have to divide those expenses as between one part and another. Of course the ordinary business man, conducting his business, who has not distinct separate departments, does not attempt to make any such division, but there are lines in which such divisions are made. For instance, railroads are required to say what should go to the passenger and what should go to the freight, and the Interstate Commerce Commission has pages and pages of forms that attempt to get that itemized down to the last penny, and yet it is humanly impossible to divide it accurate and exactly between the two.

But we are up against the necessity, that is, if we get that far—we would be up against the necessity of doing that sort of a thing in this case as to the chain business. It is for you to consider whether this witness gave an honest estimate; whether he was competent to give an honest estimate; whether you believe you should rely on that estimate; whether, as business men, you believe that you can form a better estimate; whether some or all of the considerations that he gave which led him to come to the 25 per cent conclusion, are right or not right; whether you want to reject them all or whether you want to reject some of them, and how your rejection would affect the total result, as nearly as you can come to any such conclusion. I say it is really a matter of more or less expert judgment, although a business man can form a competent opinion as to such things. For instance, the fact that you can add a certain department to your

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business without increasing the overhead expenses would not justify you in charging no part of the overhead expenses to that new department. When you come to a case like this and you have to determine what the profits are, if any, in that new department, that is not fair. The fact that you can add something on without its costing you any more, does not make that department cost you nothing; it still costs you and you would have to divide up on some fair basis of division as between all the others; each of the others would cost you that much less as you charge that department with some part of your expenses. So that particular system, if that was adopted, would not be a fair basis of division. On the other hand, if the entire business requires advertising in a catalogue, and if the chain business were 15 per cent of the entire business, and if its share of the advertising were 1 per cent or one-tenth of 1 per cent, or what not—I am not giving you the figures, I am only giving you an example—then of course it would not be fair to the chain department to say that the chain department should bear 15 per cent of the advertising expense. I merely give you these as examples, to put it up to you to determine, as business men, in how far you believe the estimate, the opinion on this question to be sound, if honest, and whether or not you believe it to be honest, and if not, what, as business men, you yourselves can say on the subject if you can say anything—because you have to be able to say this is more than a mere guess; this is an approximate result based on genuine business methods. So much for those considerations.

We come back to the vital and fundamental question, Have these defendants committed the wrong which they are charged to have committed and which is charged to have resulted in this damage to the plaintiff?

Opinions of business men differ very widely in this country on what is the best policy for the country in merchandising articles. There are a great many people who believe that a manufacturer getting out his own articles should have the right to say "I want this article sold at a definite stated price, and I won't let anybody sell it at less than that price; it is going to hurt me to have it sold at less than that price. If I can put it all over the country and if I can assure everybody who handles it that when he pays me \$3 and when I put \$5 as the price, that he is going to make \$2 and that the customer who wants that article has to pay \$5, whether it comes to John Brown or John Smith or to anybody else;" I say the manufacturer can well believe that under such a system he will tremendously increase his sales; and he can well believe and many people in this country do believe that price cutting is very pernicious and detrimental; that the manufacturer can not market his goods with the same efficiency under a price-cutting régime as he could if he was permitted to control the price at which these articles could be sold. And there have been frequent attempts, never-ending attempts, to have that principle adopted by law as the policy of this country;

and, as I say, there is no question but the people are divided in opinion as to its advisability, and there is no question, too, that all those who are going to profit by the one rule are in favor of it and all those who are going to profit by the other rule are in favor of the other rule, and the people who are not going to profit either way are divided as to what is the best thing for the country.

But it is not for you or for me, in this case, to base our conclusions on whether we think that principle is sound, or the other principle is sound, because the law of the country has been settled, and it has been settled the other way; and until Congress changes the law you and I, in the trial of cases, are bound by what the law actually is; and under the law that was in force during the time in question (and I am not going to discuss what the law was before that because it is immaterial, utterly immaterial in this case, whether the law was clear or whether it was not clear; and whether it was one way or whether it was the other way, the question is what was the law during the period now in question), the law during the period now in question was and is that a manufacturer can not control the resale price of his goods, and it does not make any difference whether it is an ordinary commodity that anybody could manufacture or whether it is something that has acquired a peculiar value because of his name connected with it, his trade-mark on the article, or whether it is something which nobody but he can manufacture, because he has been given a copyright on it, or whether it is something that nobody but he can manufacture without his consent because he has been given a patent on it. They are all alike; the manufacturer can not legally control—I mean legally control throughout the country by any general scheme to control and to prevent such competition in the article as to the prices at which they should be marketed, whether by jobbers or by dealers, the resale price.

Now, a patent gives a man a certain monopoly just as a trade-mark gives him a certain monopoly. Trade-marks differ from a patent because a trade-mark really, in effect, merely means that I made these goods; anybody else can go out and make the same goods. John can say this is John's goods and Henry can say this is Henry's goods, and just because they are John's goods people may be willing to pay more than just because they are Henry's goods; and the goods may be exactly the same, and yet John has a certain kind of monopoly on John's goods because they are his, because he has made them. A patent monopoly is something different. A patent gives a man a right, the sole right, to make that article. Nobody else can do it without his consent and without his license. That monopoly, unlike most monopolies, is perfectly legal and perfectly valid; instead of being denounced, as many monopolies are, it is encouraged by the laws of this country, and it has been to the redounding benefit of the country that patents have been encouraged and fostered. But that monopoly is not as broad as a good many people thought it was or, perhaps, still think it is.

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The peculiar thing about the patent monopoly is that you can prevent anybody else from making your article and you do not even have to make it yourself. If you can get a patent on a Weed chain, we will say, the result of the monopoly that the law gives you is that you can keep Weed chains out of the market; you do not need to make them, and still you can prevent other people from utilizing your patented idea. That is a tremendous power, but it is a perfectly legal power. The limit to that power, however, is this: That if you make the article, or if you authorize somebody else to make it and if, having made it, you put it on the market and sell it or authorize somebody to put it on the market by selling it, when the goods get into the hands of your first purchaser they are just exactly like all other articles; they stand on an equality; you can not tie up that article after you have sold it any more than you can tie up a pound of sugar after you have sold that. It is then free, so far as restraint of trade is concerned, from the patent monopoly.

You have a monopoly not only to manufacture; you have a monopoly to sell; you have a monopoly to use; and there has been considerable confusion heretofore, and up to the time that we are interested in, or nearly up to that time, and in some respects since that time, as to the limitations that this right to sell and to use—this monopoly right to sell and to use gives to a patentee. But this much is clear—at least, it will be for your purposes. This much is clear, that this monopoly to sell does not give you any right, after you have once sold, to control the further disposition of the article because it is a patented article, any more than if it was not a patented article. Your monopoly is to manufacture; your monopoly further, after you have manufactured, is to sell. If you have manufactured, you can give somebody else a monopoly to sell that which you have manufactured, but that does not mean that you can sell him what you have manufactured and still give him a selling monopoly because of your patent rights, because the moment you sell him what you have manufactured you have exhausted your patent monopoly; after selling, and when they reach his hands, they are just like any other article. But if you do not sell the article that you manufacture under your patent; if you just hand it over to him as your agent, then you can give him the same selling rights that you yourself, as the patentee, would have.

Now, in this case there is no question of the Weed Chain Company handing over any of its patent monopoly to the Motor Car Equipment Company. In this case there is no question of any agency in the true sense of the word between the Weed Chain Company and the Motor Car Equipment Company. The transactions between the two, so far as the evidence in this case shows, involved a sale by the Weed Chain Company to the Motor Car Equipment Company, what is called an exclusive agency or an agency, whether exclusive or not, practically an exclusive agency, under the testimony, of the Motor Car Equipment Company for this metropolitan district—although the testimony shows that at least one taxicab company or garage com-

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pany, if not others, bought direct from the Weed Chain Company. But this practically exclusive agency was an agency only in the sense that under the arrangement between the Weed Chain Company and the Motor Car Equipment Company, the Weed Chain Company practically was not to have direct dealings, with certain exceptions, with people in this metropolitan district, but it was to refer them to the Motor Car Equipment Company and the Motor Car Equipment Company was to deal with them; in other words, the Motor Car Equipment Company was the distributor of the product of the Weed Chain Company, not because it was an agent of the Weed Chain Company, but because it was a purchaser of the Weed Chain Company products, and because, practically speaking, other people were not sold to by the Weed Chain Company in this particular district after December 1, 1913.

Now, in and of itself there is nothing wrong in a manufacturer, whether of a patented article or of an unpatented article, adopting any particular method of marketing his product; in and of itself there is nothing wrongful in the Weed Chain Company determining that it is not hereafter going to market its product through jobbers, but is going to sell direct to the consumers. A man has a perfect right to say, "I fix the price of my product; I want to get it into the hands of the consumer at that price; there is one way in which I can succeed. I will sell to everybody alike, for his own use; moreover, I will sell one article to each person; I will not sell him any more than he needs for his own use." That is perfectly legal, perfectly proper, if a man wants to do it. Of course, we would not do much business in this country if people adopted any such archaic system. Practically speaking, of course, they do not do it, but a man has a right to do it if he wants to. He has a right to cut out the jobbers if he wants to and deal only with dealers, sell only to the retail store, because they are the ones that come into direct contact with the consumer and because he believes he is going to sell more and that he is going to be able better to keep up his prices, to get the public to pay the prices that he figures they ought to pay, and he has a right to deal only with dealers if he wants to; or he has a right to deal only with jobbers if he wants to; if he thinks that the business can best be conducted, at least his business can best be conducted, by dealing only with people who sell only wholesale or primarily wholesale, he has a perfect right to do that and say "I will not deal with dealers," or he has a perfect right to say "I will only deal with one house"—whether in the whole country or whether he divides the country into districts—and in my judgment he has a right to say, if there is no other illegality in it, that in one part of the country he is going to deal with consumers only; that in another part of the country he is going to deal with dealers only; that in another part of the country he is going to deal with jobbers only; and that in another part of the country he is going to deal with one house only.

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In all that, there is nothing inherently illegal, if that is the way he can best and most efficiently market his article. There is no law that I know of that forbids him to do it; and so, too, if he deals, as in this case, in the metropolitan district with the one house, that house again has a right to formulate its own policy—how it is going to market its goods and whether it can best deal through jobbing houses, or whether it can best deal through dealers or through both at different rates or at the same rate or directly to the consumer. But these plans can not be made the basis of a scheme unduly to restrain interstate commerce, and it is an undue restraint of interstate commerce to tie up or to attempt to tie up, whether by contract or by threat, or by a practical threat of cutting off, attempt to tie up competition, attempt to compel the people to whom the goods have been sold and who own those goods, to market them at this, that, or the other certain definite price.

And if these things which a man has a perfect right to do are done as part of a general scheme unduly to restrain competition as between the parties who are to own these goods and their subsequent marketing of them, the scheme is illegal and the steps taken pursuant thereto are illegal, and if they result in damages to any person, he may bring such an action as is here brought. Now, I have said unduly to restrain competition; I have said that a manufacturer can divide up the territory and designate one person in each territory to whom, alone, he will sell his goods. Of course, if he merely puts his goods into the hands of that person as his agent, then he himself is acting through that agent and, through that agent, he can do the same thing he could have done originally. But that is not this case. He can go further than that; he can, as I say, designate one person in each district; he can not compel that person to agree, and if there is an agreement or understanding between them, and if the designation is based on the understanding or agreement between them, whether it is in writing, whether it is by word of mouth, whether it is by looking into each others eyes or in any other way in which men come to an understanding or agreement, if it is under an agreement that the manufacturer shall control the policy as to the resale price, or that the first purchaser shall control and the manufacturer shall assist him in controlling the subsequent resale price to the people to whom he sells, the agreement is illegal because it is in restraint, and it is in undue restraint of interstate commerce.

It may be illegal in another way, however, and it may unduly restrain commerce in another way. Suppose the country were divided up, like the country is divided up, for the purposes of our Federal courts, into nine circuits, and one dealer is appointed or one distributor is appointed in each of these nine circuits, and the goods are sold to that distributor in that circuit. That distributor can fix his own price at which he is going to sell those goods, and he owns those goods, and, unhampered, he can sell them wherever he pleases, at least wherever he pleases in this country; he can engage in inter-

state commerce in those goods. Or, to make the example better, instead of nine circuits, suppose there is a distributor appointed in each one of our States. Now, that distributor, if he owns those goods, can, as I say, as a matter of law, fix his own price at which he is going to market those goods, whether he markets them through jobbers or dealers or direct to the consumer; he can sell them any place that he pleases because they are his, and if these 48 distributors or any part of them were to get together and, for the purpose of preventing competition between them, and particularly preventing the cutting of prices, because that is what competition is apt to result in, in either better prices for the consumer ultimately, or better service, or what not—if, for the purpose of preventing the competition, any two or more of these people were to get together and agree not to invade one another's State and to restrict his dealings to his own State in which he happens to have his place of business, that agreement would be an illegal restraint of trade between the States in that article, and the fact that it is a patented article would not save it from illegality; and the fact that the patentee could originally have given a territorial license to each person in the 48 States, giving him the sole right to manufacture and sell in that State, would not enable these dealers to get together in that way. Nor would it enable the manufacturer, in appointing these dealers, to exact from them an obligation similar to that which I have just spoken of and which I have assumed to exist between the dealers themselves, because if these dealers can not agree among themselves that each of them is going to stick to his own territory and not invade the other's territory, and thereby suppress competition in interstate commerce in this article, the manufacturer can not exact or compel, and an agreement or understanding between them aimed at exacting or compelling the restriction of the owner of the property to whom the article was sold, one who has paid his money, who owns it, to any particular territory in the disposition of his property, is illegal under the Sherman Act.

Now, gentlemen, it is for you to say what the facts in this case are; it is for you to determine whether the Weed Chain Company and the Motor Car Equipment Company entered into this relation. You have heard the history of the change about this time in ownership of the Motor Car Equipment Company, and I will not go into the facts, as I said before, because they have been fully rehearsed, and I have no doubt they are just as fresh in your mind as they were yesterday when both sides presented the facts to you.

It is for you to say whether, at about this time, the Weed Chain Company conceived a plan to control the reselling price of its articles and whether, as part of that plan, it made the Motor Car Equipment Company its distributor in New York, and whether the Motor Car Equipment Company joined with it and became its distributor in the metropolitan district as part and parcel of a general scheme thus to restrict competition as between those into whose hands the

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goods would come by purchase and restrict competition between them in the interstate commerce of this country.

If you find that they did, you then will find that they are guilty; and if you fail by the preponderance of evidence to find that they did so, then they are not guilty of the thing that is charged against them in this case.

Now, as I said in the beginning, it does not follow, if you do find that they are guilty, that it is these acts that caused the damage to the Lowe Company, if the Lowe Company were damaged. A man has got a right to say, "I won't deal with a certain person"—that is not an undue restraint of competition. He doesn't have to give his goods to everybody, he doesn't have to give his goods to anybody; as I said before, he can deal with one man. It isn't even an undue restraint of competition, undue restraint of trade within the Sherman Act, whatever else it may be, to induce somebody else not to deal with a certain individual. It may be a wrong; there are plenty of circumstances under which a man who influences another not to deal with a third person may be guilty of a wrong and may be subject to a suit; but all cases of that kind do not come within this law, because all cases of that kind do not amount to an undue restraint of competition. In other words, an undue restraint of competition does not refer to some single instance, and a man may object to the Lowe Motor Supplies Company handling his goods, not as part of a general scheme, but just because it is the Lowe Motor Supplies Company, just as he may object to dealing with a red-headed chap—he doesn't have to. He may even conceive that it is going to be injurious to his particular product if a red-headed chap handles it, and when he sells to somebody he may induce that person to agree that he won't sell to any red-headed man: That would not be an undue restraint of competition. It might be wrongful. Or, he may conceive, rightly or wrongly, that some particular individual is so distasteful to him, for any reason, that he doesn't want him to get his product. That would not be an agreement and an attempt to compel and an attempt to prevent that man from getting his goods, even though it resulted in driving that single individual out of business—it would not be an undue restraint of competition, it would not necessarily be an undue restraint of competition within the Sherman Act, although, as I say, it might be a very wrongful thing. It might not even be a wrongful thing. One can readily conceive of cases in which a man would be justified in law in not only not selling to some one individual but in attempting in every honest way, by persuasion, by agreement, to prevent that man from getting his product. Suppose, for instance, the Lowe Motor Company, in marketing these Weed chains, had declared, "Why, we keep these because people want them, but they are the worst thing you could possibly use; they are going to rip your tire up; we warn you against them," the Weed Chain Company and the Motor Car Equipment Company would not only have a legal right not to sell them, but they would have both a legal and a moral right, not

only outside of the Sherman Act, but outside of any prohibition of the law, to do everything they possibly could to prevent Weed chains from getting into their hands; they would be justified in that action, in my judgment. Now, they might conceive that a man who cuts the price of goods is just as bad a fellow as a man who lies—at least, who they think lies—about the character and quality of their goods. They may perfectly honestly believe that their goods ought to sell at the list price to the consumer, and that it is very detrimental to their business if a dealer cuts that list price; and they may believe, therefore, that they have an honest right to do all in their power to prevent a dealer who cuts the price from getting their goods. But, the law says that a man has a perfect legal right to cut the price. The law says, therefore, that that is no justification for their doing things to prevent him from dealing with others. It would not necessarily follow, if it were an isolated instance, that it would come within the Sherman Act even though it might be another wrong; but if it is part of a general scheme to prevent price cutters from getting the goods, if it is part of a general scheme to prevent price cutting, and thereby to maintain what they honestly conceive to be to their best interests, the law at the present time, or up to the present time, has declared that not to be to the best interests of the people of the United States. However well intentioned they may be, however honest they may be, they would, nevertheless, be guilty of a wrongdoing.

Now, while the pleadings in this case are not evidence before you, you have a right to consider the statements of counsel in addressing you; you have a right to consider, moreover, the issues as made by the pleadings. You have a right to consider whether they are proven or not. You have a right to consider the fact that issues were made for submission to you, and the question whether or not evidence was introduced to sustain those issues, and whether they have been sustained, as bearing on the credibility of the witnesses, and the truth of the versions given as actuating the parties in their dealing or refusal to deal.

I said that the Weed Chain Company and the Motor Car Equipment Company did not have to deal with Lowe. I said that there might be reasons which would justify them not only in not dealing, but in agreeing not to deal with them, without subjecting them to penalties under this act, and there might have been reasons which would permit this without subjecting them to any penalty whatsoever. Certain reasons were alleged and stated, which it was claimed furnished the reason for the acts of the parties in this case. It is for you to consider how much, if any, evidence has been introduced bearing on these issues. It is for you to consider whether in the end the actions of the parties as against this plaintiff were based, not on a general scheme to restrain competition in the manner that I have described, but purely out of some personal considerations that affected this party that did not affect the trade generally, that did not affect them as part of a general scheme in connection with the maintenance of

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prices. Then, even though the defendants were guilty, even though you find the defendants guilty of unduly restraining interstate commerce, if you should be of the opinion that their acts in connection with the Lowe Company were not part of that scheme, but something entirely independent of it, and were brought to bear against Lowe because of these personal reasons which had to do with him and with his company, and had not to do with any general scheme, then he cannot claim to be damaged because of the illegal scheme, if there was one. On the other hand, if, in your judgment, the evidence does not bear out any such defence, and if in your judgment the dealings with Lowe, or the failures to deal with Lowe, were a part of any such general scheme as we were talking about, if you find that there was any such general scheme, then it would be necessary to conclude that the damage he suffered, if any, is the result of that illegal scheme, and part of its purpose.

Gentlemen, any exceptions?

Mr. TERRY. Would your honor prefer to have them now?

The COURT. The practice in the Federal court is to take exceptions before the jury retires from the box.

Mr. VORHAUS. Plaintiff has no exceptions whatever.

Mr. MCMAHON. If your honor please, the defendant the Weed Chain Tire Grip Company excepts to that portion of your honor's charge where you say, in substance, that an agreement whereby a manufacturer and another party fix an exclusive territory in which each can sell, and that the one can not invade the territory of the other, is illegal under the Sherman law.

The COURT. May be illegal.

Mr. MCMAHON. May be illegal under the Sherman Act. I take an exception to that.

The defendant excepts to that part of your honor's charge where you stated in substance that the owner of a patent can not control the resale price of his patented article.

The defendant excepts to that part of your honor's charge where you say, in substance, although the charge is based upon the violation of a statute which is a criminal statute, nevertheless, that this is a civil case and that the plaintiff is not bound to convince the jury beyond a reasonable doubt.

I except to that part of your honor's charge where you state, in substance, that what the law was prior to this case, is immaterial.

The COURT. That is, prior to December 1, 1913.

Mr. MCMAHON. I except to that part of your honor's charge where you state, in substance, that a manufacturer, either the owner of a patent, or the manufacturer of any goods, can not control the resale price at which a jobber may market those goods. Also the same exception as to a retailer.

I would like to note an exception with reference to a patented article, that once the patented article is sold or disposed of by the patentee——

Charge to the Jury.

The COURT. I said "sold."

Mr. McMAHON. Sold, yes, that it is treated upon the same basis as any other property, irrespective of the patent.

The COURT. So far as restraint of trade is concerned.

Mr. McMAHON. Your honor will allow us to note an exception to that.

I except to that part of your honor's charge where you state that the jury have some guides in the testimony upon which to find out how much the plaintiff would have to pay to get chains in the open market, and how much they could have sold them for.

I except to that part of your honor's charge where you say, in substance, that the jury may use the estimates of witnesses not based on the books, or other evidence in the case, in determining the damages, if any.

The COURT. I didn't say any such thing as that. I said they may use—well, the point of difference between us is what you mean by "not based on the evidence in the case."

Mr. McMAHON. I mean other than their estimates.

The COURT. The jury may consider the estimates of witnesses based on the facts as testified to, taking into consideration the fact that they are estimates.

Mr. McMAHON. I except to that part of your honor's charge where you state to the jury that there is no question of agency in the case in the true sense between the Weed Chain Company and the Motor Car Equipment Company; that is, that there is no evidence in the case to that effect.

I except to that part of your honor's charge where you state that it is not justifiable to refuse to sell to a price cutter.

The COURT. As a part of a scheme to restrain trade. As a single individual instance, one can refuse to sell him because he is a white man or a black man, or a price cutter or a price maintainer, or any other reason, and it would not have anything to do with the Sherman Act; but as part of a scheme to prevent price cutting it is wrong. I think that is what I did say.

Mr. VORHAUS. Yes; you did.

Mr. McMAHON. Your honor will allow me to note an exception.

The COURT. Yes.

Mr. McMAHON. I ask your honor to charge that the Weed Chain Tire Grip Company had a legal right to refuse to sell its patented product to anybody in the United States for any reason it saw fit, or without reason.

Mr. VORHAUS. Your honor did charge that, if they decided not to manufacture or sell——

The COURT. I charged in substance so much of that as in my judgment is sound, and with such limitation as makes the unqualified charge unsound.

Mr. McMAHON. I ask your honor to charge that there is nothing forbidden by the Sherman law in the manufacturer of a patented ar-

ticle consigning or selling his product to a jobber for a particular territory, and placing certain restrictions upon the prices at which the goods are to be sold.

The COURT. I think that is already covered in your exceptions. Otherwise, I refuse that.

Mr. MCMAHON. Exception.

I ask your honor to charge that the plaintiff had no legal right to purchase goods from the Weed Chain Tire Grip Company, or the Motor Car Equipment Company at 40 off, or 40 and 2 and 5 off, and the plaintiff can not claim any damages for any loss of profits on chains between the price of 40 and 2 and 5 and the price of 33⅓, and 2 per cent for cash.

The COURT. I think I have covered that subject matter, contrary at least to the last part of your request, by my statement that it depends upon the price at which, under such an unrestricted market as the law requires, the plaintiff would have been able to purchase. As I heretofore stated, as an individual instance, or not as part of a scheme to restrain competition, there was no right in the plaintiff to buy at any particular price, or to buy at all from either of the parties. But the wrong, if any, is in the understanding or agreement not to sell at any price, or to be controlled in their policy by the other as to the retail price at which goods would be put out. I want to emphasize again, in connection with that, that the Weed Chain Company has a perfect right, in my judgment, to appoint one distributor of its product as a means to better distribution of its product in this particular territory, but having appointed that distributor it had no right to control the selling policy of that distributor as to the goods that that distributor purchased from the Weed Chain Company.

Mr. MCMAHON. I note an exception to that.

I ask your honor to charge that the distributor itself had the right to fix its own selling policy, and to sell or not to sell to any person as it saw fit.

The COURT. Except as a part of a scheme to restrain competition, yes.

Mr. MCMAHON. I ask your honor to charge that the plaintiff can only recover, if at all, its actual damages; that damages that are speculative, remote, and uncertain, may not form a basis for a legal judgment, and that there must be some evidence other than conjecture or unwarranted estimates of witnesses.

The COURT. Yes, I charge that, except three times the actual damages. I have already charged that, I think.

Mr. MCMAHON. I ask your honor to charge the jury that a mere desire or request is not equivalent to an agreement, and falls far short of an agreement, and that there is nothing invalid or improper for a manufacturer to desire or request the maintenance of a standard price on articles of commerce.

The COURT. That is sound, if it is merely a desire or request; but if it is part of a general scheme to maintain prices, and that scheme

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goes beyond a mere desire or request, and amounts practically, even though without words, either to an agreement or to a threat to cut off supplies in case the desire or request is not followed, then it is no longer a mere desire or request.

Mr. McMahon. Will your honor give me an exception to the refusal to charge as requested?

The Court. Yes.

Mr. Terry. I wish your honor would say a word to clear up a sentence or two in your honor's charge in which, as near as I could get the language, you said in substance this: That the jury may determine whether the witnesses were competent to give estimates of an apportionment of overhead, or whether you wish to follow your own estimates as gained from your own experience. I didn't get that quite clearly myself, and if your honor will say a word on that to the jury I will be obliged.

The Court. I will try to make my own views on that a little clearer, gentlemen. The apportionment of the overhead as between the chain business and the entire business is a matter of business judgment, in a business conducted as this was, according to the evidence, in which no separate allotments were made, in which no separate, distinct department was maintained. Now, whether 25 per cent or 100 per cent, or 200 per cent, or any other per cent, either less or more, or in between, of the proportionate expense, proportioned according to the amount of business in chains as compared with the entire business, is properly chargeable against the chain profits, is a matter of business judgment, based upon the nature of the article and the character of the business as developed in the testimony. Now, you don't have to accept the 25 per cent estimate if in your judgment that is not a sound estimate based upon the nature of the business and the character of the chain department, as developed in the testimony. You heard some at least of the considerations by which the witness sought to justify his reducing of the percentage to 25 per cent. It is for you to determine whether any or all of these reasons are valid, and whether as a result the 25 per cent is the proper charge, or whether it ought to be a good deal more than that, or any more than that. Does that make it clear?

Mr. Terry. Thank you.

Mr. Vorhaus. May I ask your honor to charge, in connection with that, that the jury has a right to consider that the defendants have not called any one in the automobile accessory business——

The Court. I think I did call the jury's attention to the fact—that I stated that this was a matter for business men, as experts, to give an opinion on as to what is a fair basis, and therefore the opportunity was given to either side, to the plaintiff to furnish additional expert judgment on the matter, or for the defendant to offer witnesses who might give theirs, and we have only Eisenstein and Lowe. I think Lowe's testimony on that was not stricken out.

Mr. Vorhaus. No.

Charge to the Jury.

The COURT. I don't remember; but at any rate that, at most, is what we have on that point.

Well, gentlemen, that concludes the charge. I hope that the length of my talk has not unduly wearied you and may be helpful to you in clearing the issues that you are to determine.

Your form of verdict will be: We, the jury, find the defendants not guilty, or We, the jury, find the defendants guilty, and we assess the plaintiff's damages at the sum of ——

Mr. VORHAUS. I understand that in a civil case that is not the form of verdict. It is simply for the defendant if it is for the defendant, and if for the plaintiff the amount of damages

The COURT. Well, my ignorance of your New York code of practice leads me to instruct in the Illinois form. In Illinois, in a tort case, or in a penalty case, that is our form of verdict. Your form of verdict is——

Mr. VORHAUS. For the defendant, or for the plaintiff and name the amount.

The COURT. Then, gentlemen, you will find: We, the jury, find for plaintiff and assess the plaintiff's damages at the sum of blank dollars, inserting the amount; and that amount, if you insert anything, is to be calculated by you at three times the amount of the actual damage; or, if you find for the defendants, you will say: "We find for the defendants."

Mr. VORHAUS. The verdict is not written; it is rendered orally.

The COURT. But we may have a sealed verdict.

Mr. VORHAUS. If it is sealed; yes.

The FOREMAN OF THE JURY. Do we take any memoranda in?

The COURT. You can have any or all of the exhibits that you want.

The FOREMAN. Not the exhibits, but a memorandum as to the method of estimating damages.

The COURT. I am not allowed to give that.

The FOREMAN. It has been a long case——

Mr. VORHAUS. You mean you can't remember the figures, is that it?

The FOREMAN. Yes, undoubtedly. If the jury should reach the question of damages, your honor——

The COURT. If you want any testimony read to you as to what the witness has testified on this subject, you may have it read to you, but I have no right to give you in writing part of the testimony in the case, and that is what it comes to.

The FOREMAN. We can ask for it later, can we, if necessary?

The COURT. You can come in here and ask to have read to you any part of the evidence that you want to have read to you, if you find it necessary to have any part read to you.

Mr. VORHAUS. If your honor please, is there any objection to writing out on a piece of paper the totals of the sales and purchases of the different periods, for the assistance of the memory of the jury?

The COURT. The court has nothing to say on that.

Syllabus.

Mr. VORHAUS. Have you any objection to that, taking it right from the testimony?

Mr. McMAHON. I think it would be more accurate if the testimony is read if that question comes up.

The COURT. If you find it necessary to have any of the testimony read to you you may have it read to you.

The jury retired.

VERDICT.

The FOREMAN. The jury find for the plaintiff, your honor, and award them the sum of $4,000 actual damages, which the jury understands is to be multiplied by 3.

The COURT. That is $12,000?

The FOREMAN. Twelve thousand dollars, your honor.

Mr. TERRY. If your honor please, I move to set aside the verdict on the ground that it is contrary to the evidence, contrary to the weight of the evidence, contrary to law, and on all the grounds mentioned in section 999 of the Code of Civil Procedure, except that of inadequacy of damages, and particularly that the verdict is not correct on the matter of damages, and that in that respect it is not based upon any adequate or proper or lawful evidence, and is purely speculative and a guess.

I move for 60 days' stay, and 60 days to make a case, following the final determination of this motion.

Mr. TAUSSIG. I join in the motion as expressed by Mr. Terry, on behalf of the Motor Car Equipment Company.

Mr. VORHAUS. If your honor please, I have no objection to the stay as far as that is concerned, but I move for an allowance under the statute of reasonable attorney's fees. The statute expressly states that the plaintiff shall recover threefold the damages by him sustained, and the costs of the suit, including a reasonable attorney's fee. We have been 15 days in the actual trial in court——

The COURT. I will not pass on that until I hear the motion for a new trial, which I will set down for the 24th of May. At that time I will hear you both.

TRI-CITY CENTRAL TRADES COUNCIL ET AL. *v.* AMERICAN STEEL FOUNDRIES.

(Circuit Court of Appeals, Seventh Circuit. December 6, 1916. Rehearing denied January 24, 1917.)

[238 Fed. Rep., 728.]

COURTS 328 (8)—JURISDICTION—AMOUNT IN CONTROVERSY—INJUNCTION AGAINST STRIKERS.—Where the property which strikers were threatening to destroy far exceeded $3,000 in value, and there was

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the requisite diversity of citizenship, the Federal court had jurisdiction, though less than $3,000 worth of property had been already destroyed.[a]

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 890; Dec. Dig. 328 (3).]

INJUNCTION 101(2)—STRIKERS—PICKETING.—Striking employes have a lawful right to place pickets in the streets leading to their employer's plant, to ascertain who are continuing or seeking employment there, and to persuade, but not to coerce, them not to do so, and the maintenance of such pickets, and attempts to persuade employes to cease working, can not be enjoined.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 175; Dec. Dig. 101(2).]

INJUNCTION 101(4)—STRIKES—LAWFUL ACT.—The exercise by employes of their right to combine and strike to obtain better wages, though it interferes with the employer's business, is not an unlawful conspiracy, which entitles the employer to an injunction restraining acts in furtherance thereof which are in themselves lawful.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 174, 175; Dec. Dig. 101(4).]

INJUNCTION 101(4)—STRIKES—LAWFUL ACT.—The commission of unlawful acts to effectuate that purpose does not taint the purpose itself with unlawfulness, so as to justify an injunction against lawful as well as unlawful acts in furtherance thereof.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 174, 175; Dec. Dig. 101(4).]

INJUNCTION 101(2)—STRIKES—INTERMEDDLER—UNION.—A labor union, of which former employes engaged in a strike were members, is not a mere intermeddler, whose interference with other employes may be restrained, when only lawful means are used, since a strike does not fully terminate the relationship between the parties, but creates a relationship, neither that of general employer and employe, nor that of employers and employes seeking work from them as strangers.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 175; Dec. Dig. 101(2).]

Appeal from the District Court of the United States for the Southern Division of the Southern District of Illinois.

Suit by American Steel Foundries against the Tri-City General Trades Council and others. From a decree for plaintiff, defendants appeal. Reversed, with directions to modify the decree.

Appellants, herein called defendants, appeal from the final decree entered in favor of appellee, herein called plaintiff, enjoining defendants as follows:

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[a] Syllabus copyrighted, 1917, by West Publishing Company.

Statement of the Case.

"It is further ordered, adjudged, and decreed by the court that the said de[729]fendants, the Tri-City Central Trades Council, its officers, and agents, and Harry McKenny, Ted Ishmann, Earl Galloway, William Thornberg, C. Thornberg, Tom Churchill, Clay Holmes, Eddie Roach, John Aldridge, Isaac Cook, Benj. F. Lamb, J. P. McDonough, and C. E. Gerlich, and each of them, and all persons combining with, acting in concert with, or under their direction, control, or advice, or under the direction, control, or advice of any of them, and all persons whomsoever, be and are hereby perpetually restrained and enjoined from in any way or manner whatsoever, by use of persuasion, threats, or personal injury, intimidation, suggestion of danger, or threats of violence of any kind, from interfering with, hindering, obstructing, or stopping any person engaged in the employ of the American Steel Foundries in connection with its business or its foundry in the city of Granite City, County of Madison, State of Illinois, or elsewhere, and from interfering by persuasion, violence, or threats of violence in any manner with any person desiring to be employed by said American Steel Foundries in its said foundry or plant, and from inducing or attempting to compel or induce by persuasion, threats, intimidation, force, or violence, or putting in fear or suggestion of danger, any of the employes of the American Steel Foundries, or persons seeking employment with it, so as to cause them to refuse to perform any of their duties as employes of the American Steel Foundries, and from preventing any person by persuasion, threats, intimidation, force, or violence, or suggestion of danger or violence, from entering into the employ of the said American Steel Foundries, and from protecting, aiding, or assisting any person or persons in committing any of said acts; and from assembling, loitering, or congregating about or in proximity of the said plant or factory of the American Steel Foundries, for the purpose of doing, or aiding or encouraging others in doing, any of the said unlawful or forbidden acts or things, and from picketing or maintaining at or near the premises of the complainant, or on the streets, leading to the premises of said complainant, any picket or pickets, and from doing any acts or things whatever in furtherance of any conspiracy or combination among them, or any of them, to obstruct or interfere with said American Steel Foundries, its officers, agents, or employes, in the free and unrestrained control and operation of its plant, foundry, and property, and the operation of its business, and also from ordering, directing, aiding, assisting, or in any manner abetting any person committing any or either of the acts aforesaid, and also from entering upon the grounds, foundry, or premises of the American Steel Foundries, without first obtaining its consent, and from injuring or destroying any of the property of the American Steel Foundries."

Plaintiff instituted this suit to prevent alleged threatened injury to its business and threatened destruction of its manu-

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facturing plant, located at Granite City, Ill., claimed to be worth $1,000,000, which it alleges the Tri-City Trades Council, a labor organization, and other defendants, former employes of plaintiff or members of the council, were injuring or threatening to destroy. It alleges the Tri-City Trades Council attempted to force plaintiff to raise the wage paid its employes, and to accomplish its object called a strike of plaintiff's employes. In the course of the strike picketing was resorted to, and the defendants sought the support of non-striking and prospective employes. Plaintiff further claimed that its employes were assaulted by defendants and by those engaged in picketing the shops, and that prospective employes had been so intimidated by defendants that they refused to enter plaintiff's employment. The gravamen of the plaintiff's bill is found in the following therefrom:

"Your orator further represents that the said defendants have combined and conspired to prevent your orator from employing skilled laborers at its plant, although such skilled laborers and your orator have agreed upon terms of employment that are mutually agreeable and satisfactory; that in carrying out such combination and conspiracy the defendants began picketing said plant of your orator on or about April 23, 1914; that the said defendants, on April 23 and since that time, have caused various numbers of men or pickets, to-wit, 5 to 30 men, to be stationed adjacent to the main gate of your orator's said plant, which said pickets from that day until the present time have threatened to assault, mistreat, and injure various of the employes of your orator unless said employes ceased from their work; [780]that said defendants so combining did on April 29, 1914, cause two of your orator's employes to be assaulted by said pickets," etc.

Defendants denied any and all acts of violence or assaults of any nature. On the other hand, they claimed that strike-breakers attempted to shoot the striking employes, and were urged so to do by representatives of plaintiff. Defendants also denied the existence of any unlawful conspiracy among them, but did admit "that said Tri-City Central Trades Council did place certain ones on certain streets and avenues leading to said plant charged with doing picket duty, but such ones were stationed 100 yards from such mill, and they were instructed to notify all persons who sought to enter the plant that there was a strike on, because of such reduction in wages, and such pickets were instructed to use all honorable means to persuade such ones to not enter such plant, and

not to take the places of the laboring men, who had gone on a strike on account of such reduction of wages."

The district judge, in rendering his opinion, said:

"This evidence clearly shows that this union, this trades council, by the testimony of its officers, entered upon the work of preventing this complainant from getting men to run its factory, run its plant, except upon the condition that it pay a certain scale, the November scale. That combination was illegal."

Speaking of picketing he said:

"However, speaking upon this question, I should say a word about picketing. There is no such thing as peaceful picketing. You might as well talk about peaceful violence. You may as well think of peaceful war as peaceful picketing. Considerable experience in this position, and having these cases frequently before me, has taught me that there is no such thing as peaceful picketing."

Defendants attack the decree on three grounds: (*a*) The evidence does not justify the issuance of any injunction. (*b*) The restraining order is too broad, and restrains defendants from doing lawful acts. (*c*) The court is without jurisdiction, because the amount involved does not exceed $3,000.

F. C. Smith, of Chicago, Ill., for appellants.

William E. Wheeler, of East St. Louis, Ill., and *Max Pam*, of Chicago, Ill., for appellee.

Before MACK, ALSCHULER, and EVANS, Circuit Judges.

EVANS, Circuit Judge (after stating the facts as above).

[1] Defendants' claim that the court was without jurisdiction is without merit. The necessary diversity of citizenship appears. The amount involved exceeds $3,000. It was not necessary that $3,000 worth of property should be destroyed before the Federal court acquired jurisdiction. The alleged threatened damage far exceeded the statutory sum necessary to give the district court jurisdiction.

Defendants contend that the evidence did not justify the court in granting any injunction. We are not able to say that the record presents a situation that did not warrant some action by the court. It is apparent that a situation had developed where fights had occurred and threats had been made, which if carried out would have resulted in the destruction of property. The district judge heard and saw the witnesses, and we accept his conclusion that such evidence justified

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the issuance of an injunction to restrain the defendants from the commission of certain unlawful acts.

[2] But the court also enjoined the defendants "from picketing or maintaining any picket or pickets on or about the streets leading to the premises of the plaintiff." And the order continued: [731]

"It is further ordered * * * that the said defendants * * * be and are perpetually restrained and enjoined * * * from doing any acts or things whatever in furtherance of any conspiracy or combination among them, or any of them, to obstruct or interfere with said American Steel Foundries, its officers, agents, or employes, in the free and unrestrained control and operation of its plant, foundry, and property and the operation of its business, and also from ordering, directing, aiding, assisting, or in any manner abetting any person committing any or either of the acts aforesaid."

The obvious effect and purpose of this decree was, among other things, to prevent all picketing by the defendants or others similarly interested, and to prevent these parties from persuading their fellow employes to join them in their effort to secure what the strikers apparently considered the laborers' just demands. In *Iron Molders' Union 125 Milwaukee* v. *Allis-Chalmers Co.*, 166 Fed. 45, 91 C. C. A. 631, 20 L. R. A. (N. S.) 315, the rule is so well stated that we quote from it the following:

"The right to persuade new men to quit or decline employment is of little worth unless the strikers may ascertain who are the men that their late employer has persuaded or is attempting to persuade to accept employment. Under the name of persuasion, duress may be used; but it is duress, not persuasion, that should be restrained and punished. In the guise of picketing, strikers may obstruct and annoy the new men, and by insult and menacing attitude intimidate them as effectually as by physical assault. But from the evidence it can always be determined whether the efforts of the pickets are limited to getting into communication with the new men for the purpose of presenting arguments and appeals to their free judgments. *Prohibitions of persuasion and picketing, as such, should not be included in the decree.*"

Labatt, in his work on Master and Servant (vol. 7, p. 8364), says:

"Attendance in the vicinity of the employer's place of business for the purpose of obtaining information as to those at work there, or of communicating the information that a strike is in progress, to those who may resort for employment, is uniformly regarded as lawful even

where the right to maintain pickets for the purpose of persuasion is denied."

The same writer further says:

"The preponderance of opinion is to the effect that attendance, even in numbers, for the purpose of lawfully persuading others not to work, is permissible, so long as it is not carried on in such a manner as to intimidate persons at work, or seeking employment, or to subject them to undue annoyance, or to interfere with the free access to the employers' premises."

Further authorities in support of the rule laid down in the *Iron Molders' Union* v. *Allis-Chalmers Co. case, supra*, are *Gray* v. *Building Trades Council*, 91 Minn. 171, 97, N. W. 663, 63 L. R. A. 753, 103 Am. St. Rep. 477, 1 Ann. Cas. 172; *Karges Furniture Co.* v. *A. W. Local Union*, 165 Ind. 421, 75 N. E. 877, 2 L. R. A. (N. S.) 788, 6 Ann. Cas. 829; *Everett* v. *Typo. Union*, 105 Va. 188, 53 S. E. 273, 5 L. R. A. (N. S.) 792, 8 Ann. Cas. 798; *In re Heffron*, 179 Mo. App. 639, 162 S. W. 652; *Jones* v. *Maher*, 62 Misc. Rep. 388, 116 N. Y. Supp. 180; *Jones* v. *Van Winkle Gin & Mach. Works*, 131 Ga. 336, 62 S. E. 236, 17 L. R. A. (N. S.) 848, 127 Am. St. Rep., 235; *Pope Motor Car Co.* v. *Keegan* (C. C.) 150 Fed. 148.[732]

But it is contended that the decree in these respects was proper because:

(*a*) The restraining order does not prohibit picketing per se, but restrains defendants from carrying out an unlawful conspiracy to destroy plaintiff's business; that in order to prevent the defendants from accomplishing the unlawful object of the conspiracy, it was necessary for the court to restrain the defendants from picketing the plaintiff's works, and prohibit them from arguing their cause with plaintiff's employes.

(*b*) Defendants were not plaintiff's employes, but were mere outsiders, intermeddlers, who were not truly representing the employes, but were trouble makers, fomenting strife and trouble where labor conditions and wages were entirely satisfactory to the employes.

[3] Plaintiff's contention that a court may restrain lawful acts of striking employes, when committed to carry out the purpose of an unlawful conspiracy to destroy the employer's business, is supported by many authorities. Among them are

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Sailors' Union v. *Hammond Lumber Co.*, 156 Fed. 450, 85 C. C. A. 16; *In re Debs*, 158 U. S. 564, 15 Sup. Ct. 900, 39 L. Ed. 1092; *Barnes* v. *Typo. Union*, 232 Ill. 424, 83 N. E. 940; *Karges* v. *Woodworkers' Union*, *supra*. If the record disclosed the existence of an unlawful conspiracy on the part of the defendants to injure or destroy plaintiff's property the court would be clearly justified in restraining lawful as well as unlawful acts committed in furtherance of such a conspiracy. If the purpose of the undertaking complained of were purely and simply, or even primarily, interference with the plaintiff in the conflict of its business as alleged, no act, however innocent in itself, directed to that end can be said to have a lawful purpose for its doing. Indeed, it may well be said that any act directed to that end is not a lawful act. If, on the other hand, the object of the undertaking is lawful, then the acts calculated to effectuate the object do not necessarily become unlawful merely because they interefere with the plaintiff's conduct of its business.

[4] The right to strike to secure higher wages and improved conditions of labor is too firmly established to necessitate further elucidation. From the record here we can reach no other conclusion than that the object of the strike was to secure for plaintiff's employes the November wage scale of the Union. Nothing appears in the record to indicate that this was not in good faith, or to raise the suspicion that the strike was a mere cloak to cover a deliberate purpose to interfere with the plaintiff's conduct of its business, or to injure and destroy its business and property. The purpose being lawful, if unlawful means are used to effectuate it, such means cannot be made to reach back and taint the purpose itself with unlawfulness, and thus render unlawful all the acts in its furtherance. In the pursuit of a lawful purpose to secure a raise in wages, picketing may be employed, as this court has held, to ascertain whom the late employer "has persuaded or attempted to persuade to accept employment," and persuasion may be used to induce them to refuse or quit the employment. As stated further in the Allis-Chalmers case:

[738] "The right of the one to persuade (but not coerce) the unemployed to accept certain terms is limited and conditioned by the right

of the other to dissuade (but not restrain) them from accepting. * * * Molders, having struck, in order to make their strike effective may persuade (but not coerce) other molders not to work for less wages or under worse conditions than those for which they struck, and not to work for their late employer at all, so that he may be forced to take them back into his foundry at their own terms."

Undoubtedly picketing and persuasion would interfere with plaintiff's conduct of its business, in that it would make it more difficult for it to retain old employes and to hire and keep new ones. Indeed, the very act of striking often seriously interferes with that "free and unrestrained control and operation of the employer's business" which the plaintiff here alleges as an object of the conspiracy charged; but the lawfulness or unlawfulness of the strike is not to be tested by such incidental effect of it. And so it is with persuasion and picketing, properly carried on in the interest of a lawful strike. The laborer may be strictly within his rights, although he obstructs "the free and unrestrained control and operation of the employer's business." The right to strike must carry with it by implication the right to interfere with the employer's business to a certain extent. The right to persuade prospective employes by legitimate argument must of necessity interfere with the employer's business. Where labor is essential to the successful conduct of a business, any interference with that labor is an intereference with the employer's business. But whether the interference with the business is lawful or unlawful depends upon the facts in each case.

The order in the instant case fails to recognize this difference between the lawful means of interfering with another's business as an incident to the party's own right and unlawful means adopted by the same party. Methods may be considered lawful, even though the employer's business is interfered with, because such methods are incidental to the right of the employe, which right should be and is recognized as equal to the right of the employer.

[5] Plaintiff's further contention that the defendants were not its employes at the time of the strike, and therefore had no right to picket or persuade by argument those about to enter plaintiff's employment, is not well taken. It is true a striker is not technically an employe. The relation of em-

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ployer and employe is temporarily suspended during a strike. The situation has been described as:

> "A relationship between employer and employe that is neither that of a general employer and employe, nor that of employer and employe seeking work from them as strangers."

Neither strike nor lockout fully terminates during the strike the relationship between the parties. Among the defendants in this case there were some former employes. Many of the plaintiff's employes at the time of the strike were members of the defendants' organization, the Tri-City Trades Council. These facts disprove the charge that the defendants were merely intermeddling in the affairs of a company in which they had no interest. Under these circumstances, it can not be said that the labor organization was an inter[734]meddler or that its course was contrary to the wishes of its members or the wishes of the plaintiff's employes.

In so far as the decree restrains all picketing and all persuasion and all interference with the plaintiff's free and unrestrained control of its plant and the operation of its business, it transcends the limit of proper restraint, and should be modified, so as to eliminate therefrom any restraint of defendants from doing lawful acts as indicated herein. The order of this court for the modification of the decree in the Allis-Chalmers case will afford sufficient and proper guidance for the modification of the decree herein.

The decree of the District Court is reversed, with direction to modify the same, and to enter a decree, in accordance with the views herein expressed.

STEPHENS ET AL. *v.* OHIO STATE TELEPHONE CO.

(District Court, N. D. Ohio, W. D. February 14, 1917.)

[240 Fed. Rep., 759.]

COURTS 316—JURISDICTION—COLLUSION.—Judicial Code (Act. Mar. 3, 1911, c. 231) § 37, 36 Stat. 1098 (Comp St. 1913, § 1019), authorizing the dismissal of a suit in the Federal court if it should appear that it does not properly involve a dispute within the jurisdiction of the court, or that parties have been collusively made or joined for

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the purpose of giving the court jurisdiction, does not deprive the Federal court of jurisdiction over a suit by the subscribers of an interstate telephone company whose employés were on a strike, to compel the company to furnish the service it had contracted to furnish, though the parties thereto were friendly antagonists, and the telephone company was willing to have the controversy submitted to the Federal court, since the collusion which deprives the court of jurisdiction is not an agreement between the parties that an existing dispute cognizable in the Federal courts shall be brought there, but an agreement so to adjust the situation as to clothe the court with an apparent jurisdiction which it otherwise would not have.[a]

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 862.]

[760]EQUITY 48—ADEQUATE REMEDY AT LAW.—Under Judicial Code, **§ 267** (Comp. St. 1913, **§** 1244), **providing that suits in equity shall not be maintained in the Federal courts where a plain, adequate, and complete remedy may be had at law, the fact that each one of a large number of subscribers of an interstate telephone company might have an adequate remedy at law for the interruption of the service which he contracted for does not prevent a suit by several subscribers, on behalf of all, to compel a restoration of the service, since, while the several actions at law were being tried, the suspension of service would continue, and might reach the proportions of a public calamity.**

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 156, 158.]

EQUITY 48—ADEQUATE REMEDY AT LAW—MANDAMUS—STRIKE.—Where **a telephone company's service was being interrupted during a strike by acts of unknown individuals, the remedy of subscribers by mandamus to compel a restoration of the service is not sufficiently speedy, and is inadequate, since it can not reach the wrongdoers whose acts caused the interruption of the service, and therefore such remedy does not prevent a suit in equity.**

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 156, 158.]

COURTS 289—JURISDICTION—INTERSTATE TELEPHONE COMPANY.—Under **act June 18, 1910, c. 309, § 7, 36 Stat. 544 (Comp. St. 1913, § 8563), amending Interstate Commerce Act Feb. 4, 1887, c. 104, § 1, 24 Stat. 379, so as to make it apply to telephone, telegraph, and cable companies engaged in sending messages from one state, territory, or district to another or to a foreign country, which companies shall be common carriers within the act, the Federal courts have the same jurisdiction relating to a telephone company's duties as an interstate agency that they have relating to railroads and other interstate carriers.**

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 880.]

COURTS 289—JURISDICTION—CONTROVERSY UNDER LAWS OF UNITED STATES—INTERSTATE TELEPHONE SERVICE.—Under Interstate Commerce Act Feb. 4, 1887, c. 104, 24 Stat. 379, as amended in 1889 (act Mar. 2, 1889, c. 382, 25 Stat. 855) and 1910 (act June 18, 1910, c. 309,

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38 Stat. 544), interstate telephone companies are required to furnish reasonable facilities for the transaction of their business, and that duty may be enforced by a proceeding in equity in the United States courts as a controversy arising under the laws of the United States.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 830.]

CONSTITUTIONAL LAW 70(1), 72—COURTS—JURISDICTION—LEGISLATIVE OR ADMINISTRATIVE ACTS.—A suit by the subscribers of an interstate telephone company, to require it to repair its appliances and thereafter to keep them in a good state of repair and in condition for operation, is not beyond the jurisdiction of the court, as asking the court to undertake administrative or legislative functions.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 129, 132, 133, 137.]

INJUNCTION 101(3)—STRIKE—UNLAWFUL ACTS—"LAWFUL."—Within Clayton Act Oct. 15, 1914, c. 323, § 20, 38 Stat. 738, providing that no injunction in any case between employer and employés shall prohibit any persons from terminating the relation of employment, or from recommending or persuading others by peaceful means so to do, or from attending at any place where they may lawfully be for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or abstain from work, or from ceasing to patronize or employ any party, the test whether the act is lawful is the question whether it would be lawful if no strike existed, and no action having in it the element of intimidation, coercion, or abuse, physical or[761]verbal, or of invasion of rights of privacy, nor any act or speech which a fair-minded man may reasonably judge to be intended to convey insult, threat, or annoyance to another, or to work abuse upon him, is lawful.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 174, 175. For other definitions, see Words and Phrases, First and Second Series, Lawful.]

INJUNCTION 101(2)—STRIKE—INTERFERENCE WITH PUBLIC UTILITIES.—Striking employes of a telephone company, which is a public utility whose first duty is to serve the public, can not lawfully interfere, under the Clayton Act, with the business of the company, if it can find people willing to work for it, since, if it can find laborers, it must employ them and fulfill its public duties.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 175.]

CONSTITUTIONAL LAW 82—PERSONAL RIGHTS—EXTENT.—Individual rights are and must be subordinated to the public good.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 149.]

INJUNCTION 204—CERTAINTY—PICKETING BY STRIKERS.—An injunction issued in a suit by the subscribers of a telephone company whose employes were on a strike, to compel the company to perform its contracts, which restrained all persons from doing any act which may interfere in any respect with the performance of those duties, is, in view of the fact that the interests of the public are paramount to the

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interests of the strikers or the employers, as definite as it could be made and be effective, and complies with Clayton Act, § 19, providing that, in any case between employers and employes, an injunction should specify in reasonable detail the things enjoined, conceding that that section applied to such a suit.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 422, 423.]

In equity. Separate suits by A. C. Stephens and others and by the Home Telephone Company against the Ohio State Telephone Company, in which Bert Hoffman was allowed to intervene on behalf of Local 245, International Brotherhood of Electrical Workers, and its members. On motion by the intervener and other members of the union, attacking informations charging violation of the injunction issued by the court. Motions denied.

Marshall & Fraser, of Toledo, Ohio, for complainants.

L. T. Williams, of Toledo, Ohio, for defendant.

J. A. Cline, of Cleveland, Ohio, for Local 245, International Brotherhood of Electrical Workers.

H. W. Fraser, special attorney, of Toledo, Ohio, for the United States.

Killits, District Judge.

December 12, 1916, A. C. Stephens and others, each claiming a cause of action similar in character and occasion to that offered by every other, and alleging that they were suing in a representative capacity in behalf of numerous other persons similarly situated, filed a complaint in this court against the Ohio State Telephone Company, a corporation organized under the laws of Ohio, and doing business in Toledo, of which city each of the complainants is a resident.

The complaint asserts that the defendant is engaged in the business of transmission of messages to points within and without the State of [762] Ohio over telephone lines and cables of its own extending into neighboring States, and through its connections with other companies, and that each of the complainants, and each of the numerous persons in whose behalf also the complainants profess to act, are patrons of said telephone company, with an interest as such in the maintenance of its facilities for interstate communication by virtue of their several contracts with defendant, whereby complainants, severally, are entitled to enjoy local and long-

distance telephone facilities to points within and without the State of Ohio.

It is further alleged that the defendant is obligated, by the terms of its charter and franchise for the use of the streets of Toledo, to furnish adequate facilities for telephonic communication to points in the city and within and without the State of Ohio to all persons willing to pay the fixed charges prescribed for such services by the company; that it has over 20,000 telephones connected in the city of Toledo with central exchanges by the usual and necessary wires and other constructions, and maintains a so-called "long-distance" exchange physically connected by wires and other instrumentalities to similar long-distance exchanges and central exchanges located in many cities, villages, and towns in the State of Ohio and in adjoining States, and that thereby the defendant company serves the community as an instrumentality of interstate commerce; that the defendant company has suffered and permitted its lines, cables, and other facilities to become so greatly out of repair that it is impossible for complainants to obtain and to have service for which they pay, and which defendant is obliged to furnish, and that it has become impossible for the patrons of the telephone company to have reasonably full use of the company's lines; that at 25 or more places in the city, designated in the complaint, defendant's lines and cables have become cut and are permitted to remain out of repair, to the end that over 2,500 patrons of the defendant company have been entirely deprived of telephone service, including many of the prominent manufacturing and business establishments of the city, in some of which the complainants are severally interested; that the working force of the defendant company, of operators, linemen, and repairmen, has been permitted by the company to become so depleted that it is unable to and fails to keep its lines and facilities in reasonable repair, and that the situation presents a matter of grave concern to the prosperity and well-being of the city of Toledo and its inhabitants, including the several complainants, in that the legitimate business and commerce of the city to points within and without the State of Ohio are seriously and very largely interfered with, to the very great damage of community interests; that the com-

plainants have no adequate remedy at law, and that the defendant indicates neither ability nor disposition to comply with the requirements of the several contracts alluded to, and with the obligation to maintain adequate facilities for intra and interstate communication.

It is asked, therefore, that the company be cited to answer the bill; that a preliminary order be issued to the defendant, requiring the defendant to immediately repair and put its plants, lines, wires, and facil[763]ities in reasonable order and condition for operation, and to observe its duties and obligations as an interstate carrier and as a public utility under the several acts of Congress and its contracts; and that it be determined and decreed that the rights and interests of the public and of the complainants, representing the public, are paramount in all respects to the private interests of the defendant, its officers, and employes, and all other persons whomsoever.

A few days after the filing of this complaint, a Michigan corporation, known as the Home Telephone Company of Grass Lake, filed a complaint against the Ohio State Telephone Company, alleging substantially the same condition of affairs as in the former complaint, with additional circumstances, setting forth the Michigan corporation's particular interest in the maintenance of the facilities and obligations of the local company, because the latter is the medium by which the former company maintains its interstate long-distance communication with points in the State of Ohio, and that its business in Ohio was interrupted by the failure of defendant to maintain its lines in proper repair.

Before any action was taken by the court these cases were consolidated, and thereupon the court, after notice, found that "within the past three weeks the cables of defendant company have been cut, damaged, or destroyed" at the several points set forth in the complaint, and that this situation was the result of depredations by divers persons unknown to the telephone company; that thereby followed large, but unascertainable, losses of money and business to the complainants and others and the community and an interruption of the free flow of interstate commerce; that the defendant company should immediately proceed to the repairing of the

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several cables located at or about the places mentioned in the order, and should thereafter maintain and keep all other cables, lines, wires, and appliances in good state of repair and in condition for operation. Then followed this provision:

"It is further ordered, adjudged, and decreed that the defendant company, its officers, agents, servants, and employes, those in concert or participating with them, and all persons whatsoever, and particularly all persons having notice of this order, be and are hereby enjoined and restrained from interfering in any way, or in any manner, with the cables hereinbefore enumerated, or with the repair of said cables, or with workmen engaged in repairing said cables, or with employes of defendant company when in the company's service; and all said persons and parties are enjoined and restrained from doing any acts or things which may interfere in any respect with the performance of the duties and obligations of the defendant company as a common carrier."

The answer of the defendant company, filed some time after the entering of the preliminary order, admitted many of the allegations of the complaint, but, putting the complainants upon proof as to many others of important character, which need not be discussed here, set up the fact by way of excuse that it was suffering a strike on the part of its operators and linemen, and that it was having great difficulty in maintaining its working force, because its striking employes and their sympathizers were conspiring and combining to prevent the defendant from continuing in the operation of its telephone system and from employing operators, linemen, cablemen, and other electrical [764] workers to repair the lines upon which depredation had taken place, and from maintaining the facilities of the company in operation; that their loyal employes were subjected to intimidation, abuse, and violence; and that its cables and lines were being destroyed and cut, as charged in the complaints, by the striking employes and their sympathizers.

Prior to the coming in of this answer, however, one Bert Hoffman, representing himself as a resident of the city of Toledo, applied for leave to intervene by answer and intervening petition in behalf of himself and the several members of Local 245 of the International Brotherhood of Electrical Workers, of which he was a member, and in behalf of said

union. After a finding that he did in fact sue in behalf of the said union and its members, permission was granted, and his answer and intervening petition allowed to be filed. In these admissions were made of substantially the facts set forth in the complaints, except that Hoffman denied that either he or any of the parties for whom he attempted to speak were guilty of the depredations of the lines and facilities of the defendant company. An attempt was made also in Hoffman's pleadings to raise the merits of the labor controversy between the striking employes and the company, an issue which the court has not yet considered. Hoffman's pleadings in behalf of himself and his fellows assert their intention:

> "To do and perform singly and in concert with others, by peaceful and lawful means, all acts which he is able to perform by peaceful and lawful means, to compel said company to re-employ its striking employés, and to establish fair wages and decent working conditions; that until said company shall comply with said demands of its employés this petitioner will, in every peaceable and lawful manner possible, interfere with the business of said telephone company."

The order permitting Hoffman to file his intervening petition and his answer in behalf of himself and his fellow members of the union, and of the union, contains a stipulation of his counsel, with the counsel of all the other parties to the cause:

> "That the order heretofore entered in this suit upon December 14, 1916 (the temporary order above referred to), shall be and remain in full force and effect as a preliminary injunction until the further order of this court, and that said order be observed and respected in all things until the further order of this court."

After the temporary restraining order had become a temporary mandatory injunction in the language above quoted, to which all the parties consented, including the union men, as above stated, testimony was had before the court in several instances, pursuant to the last provision of section 22 of the act of October 15, 1914, commonly known as the "Clayton Act," which testimony tended to suggest violations of the provisions thereof by various parties, including Hoffman, the representative defendant himself. Attachments were issued, based upon this testimony, and subsequently informations were filed by direction of the court. The parties arrested

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thereon were admitted to bail in amounts of from $100 to $400, and the court has now before it the return of the several respondents to the respective informations. As the [765] returns raise practically the same questions in each instance, for the purpose of this opinion we will consider only that of Gustav M. Bugniazet, one of the vice presidents of the International Order of Electrical Workers, who had been in charge of the alleged strike among the employes of the defendant telephone company. The points raised by this return, which we deem worthy of special consideration at this time, are:

First, the jurisdiction of the court to entertain an action attempted to be brought by patrons holding contract relations with the Ohio State Telephone Company under circumstances such as obtain here is questioned.

Second, that the terms of the injunction are too broad and indefinite to be valid under the provisions of sections 19 and 20 of the so-called "Clayton Act," which, it is insisted, exclusively control the court in this case.

Respecting the first contention, it is urged that jurisdiction is lacking because the suits are collusive, and because there is a lack of jurisdiction, on the theory that legal remedies are present, and because the court is asked to undertake administrative and legislative functions.

Respecting the second position taken by respondent, it is urged that the order attempted to restrain employes of the telephone company and persons seeking employment therewith from attending in places where they may lawfully be for the purpose of peacefully obtaining and communicating information, peacefully persuading persons to abstain and cease working for the telephone company, and from doing acts which might lawfully be done in the absence of such dispute concerning terms and conditions of employment, contrary to the provisions of section 20 of the Clayton Act, and that the order did not describe in such reasonable detail the act or the acts of the parties to be restrained, as provided by section 19 of the so-called "Clayton Act."

[1] In argument it is urged with considerable insistence that the court has before it a case squarely within the provisions of sections 19 and 20, and particularly the latter, of the act of October 15, 1914. There is no evidence of collusion

between the parties in this case; that the original parties may be friendly antagonists is not, however, improbable. Counsel's surmise may be correct, but something more than this is necessary to make their "collusion" reprehensible. The court will not concern itself with the fact, if it exists, that the parties to the cause have agreed to submit their alleged controversy to this court; if there is nothing in substance to support the theory of collusion, other than that, the fact is of no consequence. Provided a real controversy between the parties exists, and the same elements of jurisdiction obtain as if the action were forced upon the defendant by the plaintiff, the court will not inquire into the reason why the parties to the cause entered into an agreement, if they did, to bring their action in this court in any form. *Ashley* v. *Board of Sup'rs of Presque Isle County*, 83 Fed. 534, 27 C. C. A. 585; *Lehigh Mining & Mfg. Co.* v. *Kelly*, 160 U. S. 327, 16 Sup. Ct. 307, 40 L. Ed. 444; *In re Metropolitan Railway Receivership*, 208 U. S. 90, 110, 111, 28 Sup. Ct. 219, 52 L. Ed. 403. It is when the collusive agreement extends to an[766]adjustment of the situation, so as to apparently clothe the court with jurisdiction which it otherwise would not have, that it becomes obnoxious, so that the real inquiry here is the inquiry as to jurisdiction upon the facts alleged, and if it is found that the court is asked to consider a cause of action which exists as one within its jurisdiction, no matter what the parties thereto determine to do with it, we are not interested to ask why they presented it to this court. Section 37 of the Judicial Code is addressed to that form of collusion which is entered into "for the purpose of *creating* a case cognizable" under the code. The statute is not new; it was the law under consideration in the cases cited, and it is not understood to refer to an agreement to submit a real controversy over facts not of the making of the alleged colluding parties, but to the collusive establishment, for the purposes of a suit, of facts in controversy which otherwise would have had no existence.

[2] Counsel first insist that the complaints present no cause of equitable cognizance, because the complainants have a complete and adequate remedy at law; wherefore, under

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favor of section 267 of the Judicial Code, this suit is not sustainable. It is suggested that each of the complainants might find relief through appeal to the Interstate Commerce Commission, or through appeal to the Ohio State Utilities Board, or in an action for damages, or by an action in mandamus. Assuming, for the sake of arguing counsel's position, that any individual complainant might have a remedy at law through one of the methods suggested, still that mere fact does not suffice to make the situation here unrecognizable in equity. It is a *complete and adequate remedy at law*, only, which will oust equitable jurisdiction. The Supreme Court, in *Walla Walla* v. *Walla Walla Water Co.*, 172 U. S. 1, 19 Sup. Ct. 77, 43 L. Ed. 341, announced the rule as follows:

> "This court has repeatedly declared in affirmance of the generally accepted proposition that the remedy at law, in order to exclude a concurrent remedy in equity, must be as complete, as practical, and as efficient to the ends of justice and its prompt administration, as the remedy in equity. * * * Where irreparable injury is threatened, or the damage be of such a nature that it can not be adequately compensated by an action at law, or is such as, from its continuance, to occasion a constantly recurring grievance, the party is not ousted of his remedy by injunction."

The condition which complainants picture is one which affects not only each one of them individually, but which affects the entire public. It is obvious, assuming that the complaints state the truth, that an extension of the damage done to the properties of the defendant company in any material degree beyond what is stated in the complaints would approximate a public calamity, if that state of affairs does not already exist. While each individual complainant was carrying his complaint through the slow processes of any legal remedy, whichever one of those enumerated by counsel for respondent should be chosen, an intolerable public situation would remain and doubtless be enhanced in its calamitous features.

[3] Assuming that any one of the complainants might be compensated for his damages in an action at law, while he was having those damages ascertained, following legal procedure, they would be continuing and increasing, not only as to him up to the day of trial, but as to [767] every contract holder of the company, for his contract would entitle

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him to service with every other contract holder. While the alternative rule in mandamus was running, if one should be granted, which would be, of course, only against the defendant company, there would be no restraint upon the continuing action of irresponsible people who were placing the company at the mercy of an order in mandamus. No remedy at law would be possible, either, against probable, but then unknown, wrongdoers. Some of the remedies suggested involve of necessity a multiplicity of suits, which, when brought, would be effective only touching the particular actions, and would not reach recurring conditions, involving new causes of action. Even if there were remedies at law available to complainants, individually or collectively, or to the public, it is very plain that none was adequate to meet this situation, for no remedy had in it that celerity and comprehensiveness of operation which mark an injunction order, and which such a situation as this required in order that there may be any adequacy at all in the remedy. While the public, represented by complainants, was awaiting the necessarily slow processes of law, where would the public service have been? The futility of a resort to any suggested legal remedy to meet the situation alleged in the complaints is too plain to need any further argument.

[4] In 1910 (act June 18, 1910, § 7) the Interstate Commerce Act of 1887, and subsequently amended, was further amended to the effect that:

> "The provisions of this act shall apply to * * * telegraph, telephone, and cable companies (whether wire or wireless) engaged in sending messages from one State, Territory, or district of the United States to any other State, Territory, or district of the United States, or to any foreign country, who shall be considered and held to be common carriers within the meaning and purpose of this act."

It seems to be clear that the purpose of Congress in this enactment was to classify such corporations as the defendant here, for all purposes so far as the administration of the laws of the United States is concerned, with railroads and other transportation common carriers, for the laws pertaining to interstate commerce, while generally providing for matters of administration of the duties of instrumentalities of interstate commerce toward the public, yet comprehensively bring

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them within the jurisdiction of the Federal courts for all purposes relating especially to their duties as interstate agencies. We cite this act, therefore, to the point that all decisions touching the jurisdiction of the Federal courts under the laws relating to interstate commerce are applicable to situations arising with reference to telephone and telegraph companies, and that we may assimilate controversies respecting interstate traffic by telephone and telegraph with those which deal with transportation of goods and persons.

[5] It probably would not be disputed, at least it is not subject to dispute, that the acts of Congress regulating interstate traffic are intended to, and do, so far as it is possible for mere enactments to accomplish anything, secure to the public the effective performance of the duties imposed upon public utilities by virtue of their contracts and [768] those public engagements which result from their franchises. It was long ago held by the declaration of the Supreme Court that telegraph lines, when extending from State to State, were instruments of commerce under the protection of section 8 of article 1 of the Constitution—the commerce provision—and that messages transmitted over such lines from one State to another constitute interstate commerce. *Pensacola Telegraph Co.* v. *Western Union Telegraph Co.*, 96 U. S. 1, 24 L. Ed. 708; *Telegraph Co.* v. *Texas*, 105 U. S. 460, 26 L. Ed. 1067; *Western Union Telegraph Co.* v. *Pendleton*, 122 U. S. 347, 7 Sup. Ct. 1126, 30 L. Ed. 1187. It has also become the settled law by adjudication, as well as in many States by statutory enactment, that for all purposes respecting the rights of the public a telephone company must be treated in the same manner as a telegraph company. The Federal act of 1910, cited above, is effective also to that end.

The several sections of the Interstate Commerce Act, as enacted in 1887 (act Feb. 4, 1887, c. 104, 24 Stat. 379), and amended in 1889 (act Mar. 2, 1889, c. 382, 25 Stat. 855) and 1910 (act June 18, 1910, c. 309, 36 Stat. 544), require telephone companies to afford all reasonable facilities for the transaction of business for which they are chartered and which they engage to carry on through their contracts, and subject them, as in case of other instrumentalities of interstate traffic, to heavy penalties for failure to comply with

these obligations. As we read the statutes, the same law and procedure are applicable to them which safeguard public and private interests in the operation of any other business engaging in interstate commerce, and we find the jurisdiction of the Federal courts over analogous controversies upheld by a long line of decisions touching so great a variety of phases of dereliction that we may safely say we have here one belonging to the same category. We cite: *Chicago, B. & Q. Ry. Co.* v. *Burlington, C. R. & N. Ry. Co. et al.*, (C. C.) 34 Fed. 481; *Toledo A. A. & N. M. Ry. Co.* v. *Pennsylvania Co. et al.*, (C. C.) 54 Fed. 730, 19 L. R. A. 387; *Toledo, A. A. & N. M. Ry. Co.* v. *Pennsylvania Co. et al.*, (C. C.) 54 Fed. 746, 19 L. R. A. 395; *Wabash R. Co.* v. *Hannahan et al.*, (C. C.) 121 Fed. 563; *Sunderland Bros. et al.* v. *Chicago, R. I. & P. Ry. Co. et al.*, (C. C.) 158 Fed. 877; *Northern Pac. Ry. Co. et al.* v. *Pacific Coast Lumber Mfrs.' Ass'n et al.*, 165 Fed. 1, 91 C. C. A. 39; *Cleveland, C., C. & St. L. Ry. Co.* v. *Hirsch*, 204 Fed. 849, 123 C. C. A. 145; *Alaska S. S. Co.* v. *International Longshoremen's Ass'n of Puget Sound et al.*, (D. C.) 236 Fed. 964; *In re Lennon*, 166 U. S. 548, 17 Sup. Ct. 658, 41 L. Ed. 1110; *Western Union Telegraph Co.* v. *James*, 162 U. S. 650, 16 Sup. Ct. 934, 40 L. Ed. 1105; *Southern Railway Co.* v. *Tift*, 206 U. S. 428, 27 Sup. Ct. 709, 51 L. Ed. 1124, 11 Ann. Cas. 846; *Macon Grocery Co.* v. *Atlantic Coast Line Railroad Co.*, 215 U. S. 501, 30 Sup. Ct. 184, 54 L. Ed. 300; *Louisville & Nashville Railroad Co.* v. *F. W. Cook Brewing Co.*, 223 U. S. 70, 32 Sup. Ct. 189, 56 L. Ed. 355; *United States* v. *Pennsylvania Railroad Co.*, decided Dec. 11, 1916, 37 Sup. Ct. 95.

Extended comment upon these cases is unnecessary. We may note, however, that in the *Tift case*, 206 U. S. 428, 27 Sup. Ct. 709, 51 L. Ed. 1124, 11 Ann. Cas. 846, the court held that, although an action[769]at law for damages to recover unreasonable rates existed, the Federal court could entertain a bill in equity to restrain the enforcement of an unreasonable schedule of rates; and in the case last cited (*United States* v. *Pennsylvania Company*) it was held that the Interstate Commerce Act does not give the Interstate Commerce Commission power to direct a railroad company to provide reasonable facilities for service, that is, that the act does not

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give the commission the power to enforce the provision that "it shall be the duty of every carrier * * * to provide and furnish such transportation upon reasonable requests therefor," but that such power is lodged only in the courts. See *Pa. R. Co.* v. *U. S.*, (D. C.) 227 Fed. 911. So, also, in the *Beer case*, 223 U. S. 70, 32 Sup. Ct. 189, 56 L. Ed. 355, it was held that the refusal of a common carrier to accept a certain class of freight did not give rise to an administrative controversy within the jurisdiction of the Interstate Commerce Commission, but created a question to be determined only by a court. The criterion is the presence of a controversy arising under the laws of the United States. We feel that we are entirely justified upon this current of authority in holding that we have such a controversy here.

[6] As the court is not asked to perform an administrative act, so we are unable to see with counsel that it is asked "to legislate and fix the quality of service required to be given by the defendant company, not only that the present service is inadequate, but as fixing the standard of service which will be required of the company." We see no application to the instant situation of any of counsel's authorities on this subject. It seems to us that this is plain from a consideration of the order issued, which follows the prayer of the complaint, and which reads in its material parts as follows:

"The court finds that within the past three weeks the cables of defendant company have been cut, damaged, or destroyed at the points hereinafter set forth, and that by reason thereof telephones of defendant company, which are instrumentalities used and useful in interstate commerce, have been rendered inoperative and that complainants, being directly interested in certain of said cables and telephones, and appearing herein on behalf of all persons interested, are entitled to have said cables immediately repaired and to have service thereon immediately reëstablished. * * * It is therefore ordered, adjudged, and decreed that the defendant company shall immediately repair all its cables located at or near the following places: [Here follows a description of points where repairs are imperatively needed as alleged in the complaint.] * * * It is further ordered, adjudged, and decreed that the defendant company shall immediately repair all other cables, lines, wires, appliances, and facilities of the defendant, and that it shall keep and maintain all said property in a good state of repair and in condition for operation."

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Other parts of the order are either injunctional or findings of facts. The order itself is sufficient answer to all of counsel's argument. Such an order would be clearly within the power of a court in mandamus proceedings, and if it could be issued at law, in a case of this kind where mandamus, by reason of procedure and because of continuing conditions, is a cumbersome and inadequate remedy, it could be granted by a court of chancery.

It is contended that, although this suit was instituted by patrons of the company against the company only, it is squarely within section 20 of [770] the Clayton Act, which enacts certain limitations upon the power of Federal courts "in any case between an employer and employes, or between employers and employes, * * * or between persons employed and persons seeking employment," involving a labor controversy. This contention will occupy here none of the court's time. It is at present of no consequence to consider whether this section 20 should be construed to govern cases not within the exact terms of its limitations. If this portion of the act presents the novel features claimed for it, it may well be argued that it is therefore class legislation, which, if valid at all, must be construed narrowly; but respondent's motion to the information against him may be disposed of to a better purpose if we assume, with his counsel, that the Clayton Act applies in every section to this controversy, it being understood, of course, that the court is not deciding the point, but joint with counsel in the assumption, because, if section 20 of the act does not apply, respondent's case is hopeless.

The fact that Local 245 of the International Brotherhood of Electrical Workers was permitted to intervene through the representations of Hoffman must not be taken as indicative that the court finds the case to be under section 20. The question still remains whether the issue that now appears between the complainants and the union is under the Clayton Act. Without extended comment, we hold that an "irreparable injury * * * to a property right, of the party making the application, for which * * * there is no adequate remedy at law," is involved in this case, to prevent and abate which the action is brought. As clearly we must hold,

also, that that is described "with particularity in the application." Argument to the contrary seems to us to be mere effusive verbality.

[7] The second paragraph of section 20 we quote in full as the important one. It has sometimes been called "Labor's Bill of Rights." We may as well call it an "Employer's Bill of Rights," and also, when there is a labor controversy involving a public utility as here, the "Public's Bill of Rights." The "rights" guaranteed by it to the employes, "in any case between employer and employes," are to be set up against and limited by the certain "rights" of the employer therein written. He has just as much right, under this section, that his employes shall not exceed the limits of their rights under it as they have to enjoy them. The rights of the employer begin where those of the employes stop. The granting of a "right" by statute always involves an obligation upon the favored one not to exceed its limitations. The act says:

> "And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by *peaceful* means so to do; or from attending at any place where any such person or persons may *lawfully* be, for the purpose of *peacefully* obtaining or communicating information, or from *peacefully* persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by *peaceful* and *lawful* means so to do; or from paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of value; or from peaceably assembling in a *lawful* man[771]ner, and for *lawful* purposes; or from doing any act or thing which might *lawfully* be done in the absence of such dispute by any party thereto; nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States."

It is well to note, and not to lose sight of, the fact that the words "lawfully," "peacefully," "lawful," "peaceful," dominate the thought of the second paragraph of the section in question; they control its meaning, as they control both the court and the parties to a labor controversy. The statute but enacts the position which courts have universally taken; there is nothing new in it, for we hold that no case exists where a court has attempted jurisdiction to control lawful and peace-

able action by injunction, although it may seem that sometimes judgment may have been faulty as to what particular action was "unlawful" or provocative of a disturbed peace. The challenge to the court is to define "peaceful picketing" within the limits of this section. This does not seem to be an occasion for an attempt at an academic formula, which, in any detail, would meet all exigencies possible in labor controversies, if one could be drawn up.

Each case presents its own peculiar questions. An act may be lawful and peaceful, or just the opposite, according to its setting. It is easier, and far more practicable, therefore, to deal in prohibitions than in affirmations. Broad generalizations, however, are easily framed, because, if we just keep in mind the prevalence in the statute of the qualifying idea of "peaceful" and "lawful" action, we cannot be misled. The best we have seen is one lately appearing in a newspaper devoted to labor interests. It is:

"*What constitutes peaceful picketing may be answered by any fair-minded man, if this question is asked, 'Would this be lawful if no strike existed?'*"

We accept this as a very good test, and apply it to the concrete questions of fact arising in this case, as propounded in the several informations, with conclusions certain to come to every "fair-minded man." Suppose no strike were in progress—

Would it be lawful for one or more men to use offensive, abusive, insulting, or threatening language to another or others—for one to call another a "rat," a "scab," a "thief," an "outcast," or by any other name commonly accepted as offensive, or degrading, or calculated to provoke the other to break the peace in resentment?

Would it be lawful for one man, or more, to take station adjacent to the place of rest, lodging, or work of another, or others, and there, by gesture, language, or otherwise, convey to the other insult or threat?

Would it be lawful for one or more men to force his or their talk upon the unwilling ear of another—to compel him to listen against his will?

Would it be unlawful for one man or more to persistently follow another to and from his work, to his home or lodging,

and about the city, forcing upon him unwillingly their presence, without occasion other than to unmistakably suggest to him their hostility unless he meets their views?

[772] Would it be lawful for one to photograph another against his will, especially under circumstances which indicate unfriendliness to be the spirit, and a hostile use of the photograph to be the object?

Would it be lawful to slink upon an unsuspecting man, inoffensively gazing into a shop window, and deal him a blow—to step from the hiding of an alley to trip a lady and then to strike her escort as he stoops to her assistance?

These questions are formulated upon the testimony produced in open court, because of which attachments were issued under the law, resulting in the filing of informations against which counsel for respondents has presented the motions we are considering. This court has heard other testimony upon which as yet no writs have issued. Upon the facts therein alleged, and upon alleged occurrences which have been the subject of comment in the public press since the middle of November as part of local contemporaneous history, we may ask certain other questions, and thus touch upon all the phases of disorder which have marked the city of Toledo in the time mentioned and which there is apparent justification in assuming were incidents of the strike. If no strike were in progress—

Would it be lawful to intercept a young girl on her way to work and beat and scratch her and tear her clothing; to destroy the telephone connections with public hospitals, so as to leave them without means of communication; to destroy fire department lines, hazarding the safety of property; to so menace, threaten, and frighten the employes of another as to make it necessary to convey them to and from their work in armored or protected cars; to so act as to gather large crowds of bystanders and curiosity seekers about places of business, to the interruption thereof; for a crowd of a dozen or more men to surround a vehicle, follow it through the business streets of a city, shouting offensive names, stopping or interfering with traffic; to cut automobile tires; to strew tacks in streets for the purpose of destroying tires; to throw bricks and stones at automobiles; to assault

and beat a boy engaged in delivering water to a place of business; to assault persons entering one of the prominent hotels of the city, or to follow such persons from their place of employment to said hotel, calling them offensive names and causing crowds to gather?

Of course, the court is not assuming that these things are established facts, or that the commission of any of them should be charged to any parties now before the court, although the public prints, without any denial, ascribed some of these transactions to the activity of strikers on picket duty, who are parties to this cause. We are calling attention to them only because they are incidents not uncommon in labor controversies, and as such occurrences were not noticeable incidents of the city's history prior to November, 1916, except in cases of other strikes, and as it is not understood that the defendant company was having such experiences before that date, it is not unnatural to assume that they were induced, those that really occurred, in some manner by the labor controversy which caused this suit. Because such occurrences are liable to be the result of passions inflamed by such con[773]troversies, there is an insistent and undeniable demand that all persons having part in a strike, who are trying to exercise their rights under the law to maintain a strike, should be persistent in their efforts to keep the controversy within lawful bounds and to guard that these inexcusable results do not follow; otherwise, in the estimate of the public generally, they will be held to some considerable measure of responsibility.

"Any fair-minded man" will answer each of these questions above stated in the negative. It must be borne in mind that not every act is lawful against which no positive provision of law exists. Many acts are unlawful for which no affirmative penalty is enacted, or against which no redress at law is possible; and some, while within the prohibitions of positive law may not offer a practicable occasion for redress at law, yet a court of equity may be asked to protect the intended sufferer from the annoyance and damage they may create, and such a court may enforce its prohibitions. No legislation yet exists to the contrary, if legislation depriving courts of such power is possible. Some acts, law-

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ful when but once performed, may become unlawful when repeated for the purpose of annoyance or damage and may be restrained when that purpose becomes plain.

The right of free speech does not give anyone the privilege to force his views upon others, to compel others to listen. The right of the others to listen or to decline to listen is as sacred as that of free speech. It is clear that, if one does not desire speech of another, he may as surely have his privacy therefrom as the privacy of his home. It is undeniable that the so-called right of peaceful persuasion may be lawfully exercised only upon those who are willing to listen to the persuasive arguments.

Again, every man has the right to the pursuit of his lawful business or employment undisturbed, and any act performed with intent to disturb the full and unrestrained exercise of his faculties and wishes in such employment is plainly unlawful.

Again, he has the right of privacy and freedom from molestation of private persons, hostile or otherwise, at his home, at his lodging, at his place of work; he has the right to walk the streets without annoyance from the unwelcome attentions of others, so long as he is conducting himself in a lawful manner.

Again, the right of one to the privacy of his own features, to the end that he may not be photographed without his consent, is manifest. It has been sustained by the courts in actions for damages.

Again, the right of one man to work is as much entitled to respect as the right of another to cease work or to strike.

Again, the right of an employer to engage whomsoever he chooses is as strong as the right of an employe to refuse to work.

Again, the right of an employer to have access to and from his place of business, and his right to have the streets and public highways in front of his place of business kept clear of crowds, bystanders, and curiosity seekers, is as strong as the right to picket, and no picketing which is conducted in a manner to attract and retain the presence of crowds can be said to be peaceful or within the law.

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[774] It is a safe and proper generalization that any action having in it the element of intimidation or coercion, or abuse, physical or verbal, or of invasion of rights of privacy, when not performed under sanctions of law by those lawfully empowered to enforce the law, is unlawful; every act, of speech, of gesture, or of conduct, which "any fair-minded man" may reasonably judge to be intended to convey insult, threat, or annoyance to another, or to work assault or abuse upon him, is unlawful. Not a syllable of the Clayton Act, or of any other law, whether of legislation of Congress or of the common law, sanctions any of the incidents we have referred to. They are to be condemned as legally inexcusable—such must be the verdict of "any fair-minded man"—nothing can be said in justification.

These propositions are so elemental that, but for the confusion which exists in many minds that a labor controversy affects the commonest rules of life, it would seem a waste of time to state them. The existence of a strike does not make that lawful which would otherwise be unlawful. These personal rights to which we have alluded are, in each instance, precisely those which the striker himself would insist upon were conditions reversed. They are also so plain, and the answers to the questions involving them so certain, that one called upon to enforce the law, if he has but ordinary intelligence, will plainly fail to do his duty when in his presence a fellow citizen suffers an invasion of his rights of this character.

The things we have mentioned are so clearly unlawful that the failure or refusal of public officials to prevent their occurrence or to punish their commission presents a plain and reprehensible evasion of official duty. Any officer of the law, a policeman, for example, ought to know that such acts are in violation of law, and of individual rights, subjecting their perpetrators to restraint and to punishment; he must know that a sworn duty devolves upon him to arrest the guilty party, and that such an arrest would be, in no respect, an invasion of any right arising from a strike or the right of peaceful picketing. Having a mind capable of understanding the question, "Would this be lawful if no strike existed?" he could have no difficulty in seeing his duty to prevent such

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occurrences. If the court may accept as reasonably accurate the testimony it has heard, and if we may accept as fairly reliable the history of Toledo as it was detailed in the newspapers in the months of November and December, wherever the responsibility therefor may be placed, no "fair-minded man," in our judgment, can say that the plain rights of individuals and the right of the public to order were in all possible cases observed and preserved to the degree which law and official obligation demanded.

The labor organization, party to this case through the representation of Hoffman, came here voluntarily and was admitted upon its application and the statement of its counsel, in the presence of the officers of the organization, that the injunction then in force would be observed and respected until it should be modified or vacated by this court. Indeed, we have, as we have observed, exactly the injunction which the labor defendants in this court agreed should be issued. Yet it pleads that it intends to "interfere" by all "lawful means" with the business [775] of the defendant company. It should know, and act upon the knowledge, that the only "interference" which the law permits is that incidental to a strict observance of the terms of section 20 of the Clayton Act. If it goes beyond the privileges of action therein provided, it comes within the court's restraining and punitive processes. Its only safe course, in pursuing its "interference" methods, is to place intelligently and carefully, in word and conduct, the same emphasis which Congress employed on the expressions "lawful" and "lawfully," "peaceful" and "peacefully," as used in the act.

[8] The Ohio State Telephone Company is a public utility. Its first duty is to serve the public. Its work meets a vital public necessity. The right of its striking employes to "interfere by lawful means" with its business does not mean a right to cripple performance by it of its duties to the public, if it can find people willing to work for it. If labor can be had, the company must employ, and the strikers must permit it to employ and use, labor to perform its public duties, and anyone willing to work for it must be allowed by everybody entire freedom to do so. The public, having a great need for services of the character offered by this public

utility, has an enforceable right to demand these conditions of both the company and of those associated in controversy with it. This court is empowered to say to the company that it must meet its public obligations. Coupled with that power of the court is the power and duty of laying its prohibitive and punishing hand upon anyone whose willfully unlawful conduct tends to render abortive the exercise of that power. We can no more say to the company that it must yield to the demands of its striking employes than we can say to them that they must meet the company's exactions. The controversy must be carried on, on both sides, without substantial detriment to the company's public service.

"Peaceful picketing" is exercisable only within these limitations; no "interference" with the company's business is lawful which exceeds them. Whatever may be the effect of this provision of the Clayton Act now under consideration upon controversies engaging corporations not public utilities and their employes, we can not believe that Congress enacted against the public welfare to sanction more than we have above indicated.

[9] Two maxims, which have much the same meaning, are universally treated as controlling all legislation and as limiting all personal rights. They are "Salus populi est suprema lex," and "Salus reipublicæ suprema lex." Liberally translated, they mean that the public welfare is the first and supreme consideration. They are the law of all courts and all countries. Individual rights universally are, and plainly must be, subordinated to the public good, and of this principle we have many applications, of which the superior quality of the public's interest in the service of a public utility vitally conserving the public welfare is one. Congress must be considered to have legislated in the light of this principle, which must be resorted to as one essential criterion of interpretation of the acts of all legislatures.

[10] Holding, as we must, that the public interest in the company's public service is the first consideration, that it is paramount to that in[776]terest in the company's affairs held by the very small fraction of the public which would work for the company, and to that enjoyed by that other

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very small fraction whose members hope for a return from their investments, we are unable to agree with respondent's counsel that the order is deficient, because it does not conform to the provision of section 19 of the Clayton Act that an injunction order should specify in "reasonable detail" the things enjoined. That portion most vigorously attacked as too broad and indefinite is the provision restraining the doing of—

"any acts or things which may interfere in any respect with the performance of the duties and obligations of the defendant company as a common carrier."

This provision is as definite as it is possible to make it. It is this paramount interest in the public which may not suffer interference as the result of the controversy, and it is impossible to set out every act or line of conduct which might work interference. Labor controversies are not unexpected or unusual; courts recognize that they are possible; courts also notice that the existence of one produces some embarrassment to the employer affected in the management of his business. Whether that embarrassment arises to a state of "interference," as that term means in cases of this sort, depends upon how the controversy is conducted on either or both sides. A total cessation of the employer's business, even of that of a public utility, might not indicate an illegal interference under some circumstances. A strike *lawfully* conducted is not an illegal interference, although it might effect even a total paralysis of a public utility's activities, resulting in great public suffering and loss. The right to abandon employment, by individuals singly or in association, is unquestioned, and the law maintains the right of such late employes, commonly known as strikers, to "peacefully" persuade others to abandon the same employment, or to refrain from engaging in employment, and to that end "peaceful picketing" is permitted for purposes of observation and information and "peaceful persuasion." But no single act, to which we have alluded above, can be possibly considered to be a necessary, and hence an excusable, accompaniment of peaceful picketing. Such acts tend inevitably to that "interference" which the law condemns.

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In a recent decision, *Tri-City Central Trades Council* v. *American Steel Foundries*, 238 Fed. 728, 151 C. C. A. 578 (October session, 1916, 7th Circuit Court of Appeals), which the public prints treated as one favorable to organized labor, this language occurs:

"Plaintiff's contention that a court may restrain lawful acts of striking employes when committing and carrying out the purpose of an unlawful conspiracy to destroy the employer's business is supported by many authorities (citing [*Sailors Union of Pac.* v. *Hammond Lumber Co.*] 156 Fed. 450 [85 C. C. A. 16]; [*In re Debs*] 158 *U. S.* 564 [15 Sup. Ct. 900, 39 L. Ed. 1092]; [*Barnes & Co.* v. *Chicago Typographical Union No. 16*] 232 Ill. 424 [83 N. E. 940, 14 L. R. A. (N. S.) 1018, 13 Ann. Cas. 54]; *Karges Fur. Co.* v. *Amalgamated Woodworkers Local Union No. 131*] 165 Ind. 421 [75 N. E. 877, 2 L. R. A. (N. S.) 788, 6 Ann. Cas. 829]). * * * If the purposes of the undertaking complained of were purely and simply, or even primarily, interference with the plaintiff in the conduct of his business as alleged, no act, however innocent in itself, directed to that end, can be said to have a lawful purpose for its doing."

[777] We cite and quote this case, not because it presents a novel doctrine, but simply because it is the latest on the subject. It is a legal proposition, too firmly settled to be disregarded, that two or more persons may not combine to employ activities, in which singly they might lawfully engage, with an intent that the effect of their joint action should be the injury of another, and there is absolutely nothing in any provision of the Clayton Act, and we have in mind particularly sections 6 and 20, that weakens the force of this principle. The case we cite is decided with reference to the Clayton Act. In this view, we suggest that the bald statement in the pleading of the labor organization referred to that its purpose is to "interfere" by lawful means with the business of this public utility comes perilously near a confession that an unlawful conspiracy is in progress, and the only way that such a conclusion can be avoided is a line of conduct during the further continuance of this strike which will secure the public against that interference with the business of this public utility which is the direct result of the unlawful acts of the character of those to which we have alluded. Accompanying the strike have been occasions of undoubtedly unlawful interference. If convictions should fol-

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low the charges now before the court, involving members of Local 245 when on "picket" duty, the attitude of the union as a law-abiding organization would be prejudiced very unfortunately, especially when it is considered that it formally urges to this court its purpose to "interfere" with the company's business. If its members will confine their strike activities within the limits of the Clayton Act, then whatever embarrassment ensues to the company will be no illegal interference.

The court's views as to what is and what is not peaceful picketing in the instant case are sustained by an unbroken current of authority. The early authorities are summed up in Labatt on Master and Servant, vol. 7, p. 8364. Our position is consistent with Judge Tayler's opinion in a local case. *Pope Motor Car Co.* v. *Keegan*, (C. C.) 150 Fed. 148. We cite but two additional cases, already referred to in this opinion, because they are the latest cases and deal with conditions since the Clayton Act was passed, namely, *Tri-City Central Trades Council* v. *American Steel Foundries*, *supra*, and *Alaska S. S. Co.* v. *International Longshoremen's Ass'n of Puget Sound et al.*, supra. The concluding paragraph of Judge Neterer's able opinion in the last case cited we regard as specially worthy of the attention of the labor defendants in this case. We quote 236 Fed. 972:

"While there is no testimony that any of these acts were expressly authorized, there is no evidence that the acts were disapproved, or members disciplined or expelled. The testimony does show that the defendants did have control of the situation, and did not exercise their influence or power to correct the irregularities or disavow the acts until the issuance of the temporary restraining order and service upon the defendants, when all overt acts ceased, which, considered with what defendants did do, confirms the conclusion that the acts were under the authority and within the control of defendants. When persons or parties set in motion machinery for the purpose of shaping sentiment, they can not take the benefits without also being burdened with responsibilities. Such parties thereby assume the burden of controlling such agency, if within their power; and if, perchance, some persons unauthorized, acting with defendants, commit unauthorized acts, it is incumbent upon the defendants to [778] show such fact, and, if committed by members under the control of the association, to disavow such acts by causing such offending members to be disciplined or expelled."

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A history of this controversy shows that, immediately after the issuing of the court's temporary restraining order, the most flagrant public manifestations of unlawful conduct ceased; that thereafter those things were done which could be done surreptitiously or with a smaller chance of detection, although one or more of the informations follow attachments after testimony involving several members of the union, and consequently parties to the injunction, in what appears to have been an indecent public disorder, which was permitted by a local peace officer, who was present, to proceed with no attempt at repression.

The informations in question are all lodged against members of the union. If the charges are sustained on trial, it would appear that they have violated the beneficent provisions of the act which their counsel claims gives them special consideration. It would seem, therefore, that more time for the honor of the defendant local union might be profitably spent in getting at the facts, the truth of the charges, and less to technical objections which have nothing to do with the merits.

If the court finds the several charges sustained by the testimony, if the acts, willfully performed, bear with reasonable certainty the construction that they were performed with coercive, intimidating, insulting, or annoying intent, that thereby the lawful business of the company may suffer interference, the court's duty is plain to say that the acts are not privileged by any law and are violative of the order in this case to which Hoffman and his fellow members consented. In such case, some more tangible and distinct proof is indicated to be necessary that the union honors the law its counsel invokes than mere disclaimer of responsibility. In such an event the unfortunate assertion in the pleadings that Hoffman and his associates intend to "interfere" by means of what they call "peaceful" and "lawful" measures would create a demand for action more definite than even words of condemnation by Local 245 of its guilty men. Judge Neterer, in the opinion quoted, points out the way. The law that is called upon to protect Hoffman and his fellow members should be honored by it. The local and defendant union "set in motion machinery for the purpose of

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shaping sentiment"; its responsibility is clear to control such agency within lawful bounds.

We make these observations, not to convey an impression that anyone under charge is guilty—no one has been tried, and we may have no opinion yet—but moved by a profound conviction that, because of the undeniable lawlessness which has accompanied the telephone strike, and because of the condition of the record made so far in this case, an imperative demand exists now, for its own good, for affirmative action by Local 245 to range itself definitely on the side of law and order, if it would have that efficiency for social good of which organized labor is capable, and which alone justifies its existence, and if it would have and retain public respect. The local should protect its members against unjust charges; its duty to itself and its membership is just as plain to [779] set itself sternly against disorder. There is no legal excuse for disorder in a strike; somebody is always responsible in some degree to the law for disorder.

The motions to the several informations should be denied.

UNITED COPPER SECURITIES COMPANY ET AL. *v.* AMALGAMATED COPPER COMPANY ET AL.

ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 208. Argued April 24, 1917.—Decided May 21, 1917.

[244 U. S., 261.]

The established principles limiting the right of a stockholder to sue on behalf of the corporation when it refuses to do so, restated and held applicable to an action for damages based on alleged injury to the corporation through violations of the Sherman Act.[a]

The rule which confines the individual stockholder to the equitable forum when seeking to enforce a right of the corporation applies when the cause of action arises under the Sherman Act, as in other cases. *Fleitmann* v. *Welsbach Co.*, 240 U. S. 27, distinguished.

Whether or not in an action by stockholders to enforce an alleged right of their corporation this court has power to substitute as plaintiffs persons appointed receivers of the corporation while the writ of error is pending, *Held* that in the circumstances stated in the opinion such a motion was without merit in this case.

223 Fed. Rep. 421, affirmed.

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The case is stated in the opinion.

Mr. Ferdinand E. M. Bullowa, with whom *Mr. Ralph James M. Bullowa*, *Mr. Emilie M. Bullowa*, and *Mr. Robert H. McCarter* were on the briefs, for plaintiffs in error.

[262] *Mr. John A. Garver* for defendants in error, Amalgamated Copper Company *et al.*

Mr. Louis Marshall for defendant in error, Adolph Lewisohn.

MR. JUSTICE BRANDEIS delivered the opinion of the court.

This is an action at law. The complaint alleges that plaintiffs are the holders of more than 200 of the 500,000 shares of the outstanding stock of the defendant United Copper Company, a New Jersey corporation; that the defendants other than that company have by conduct violating the Sherman Law (act of July 2, 1890, c. 647, 26 Stat. 209) injured it to the extent of more than $5,000,000,[1] and that:

"IV. In or about the month of January, 1912, and before the commencement of this action the plaintiffs, United Copper Securities Company and Arthur P. Heinze, each made a demand upon the defendant, United Copper Company, that this or a like action be instituted by said corporation defendant, and said corporation defendant, and its board of directors, have refused to comply with said demand, and have failed and refused to commence or cause to be commenced any action whatever in compliance therewith.

"V. This action is commenced and prosecuted by the [263] plaintiff United Copper Securities Company, and by the plaintiff, Arthur P. Heinze, each individually and for himself and also on his own behalf and on behalf of all the other stockholders of said United Copper Company."

The complaint concludes:

"Wherefore, the plaintiffs demand judgment in their favor and in favor of any stockholders of the United Copper Company who may join with them in the prosecution of this action in the sum of three-

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[1] The bill is framed on the theory that the injury to the United Copper Company was suffered directly, as a competitor of the other defendants, and the case will be discussed on that supposition. It is proper to observe, however, that the allegations of the bill are ambiguous in this respect, and that the United Copper Company appears to have been a mere holding company, which suffered injury only indirectly as controlling stockholder in various mining companies alleged to have been damaged by the conspiracy and which were not made parties to this suit.

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fold damages under section 7 of the act of Congress aforesaid, and that each of the defendants shall be compelled to pay the damages sustained by the United Copper Company, as hereinbefore alleged."

The district court sustained a demurrer and dismissed the complaint. Its judgment was affirmed by the Circuit Court of Appeals, 223 Fed. Rep. 421; and the case comes here on writ of error. A motion for substitution of plaintiffs, hereafter referred to, was made in this court and argued with the merits.

There is no statement in the complaint that the alleged wrongful acts have caused injury to the plaintiffs as individual shareholders; and no recovery is sought for damages to them or to their property. The case involves, therefore, this single question: Whether a stockholder in a corporation which is alleged to have a cause of action in damages against others for conduct in violation of the Sherman Act, may sue at law to recover such damages in the right of the corporation, if, after request, it refuses to institute the suit itself? Insuperable obstacles to the maintenance of the action are presented both by the substantive law and by the law of procedure.

Whether or not a corporation shall seek to enforce in the courts a cause of action for damages is, like other business questions, ordinarily a matter of internal management and is left to the discretion of the directors, in the absence of instruction by vote of the stockholders. Courts inter[264]fere seldom to control such discretion *intra vires* the corporation, except where the directors are guilty of misconduct equivalent to a breach of trust, or where they stand in a dual relation which prevents an unprejudiced exercise of judgment; and, as a rule, only after application to the stockholders, unless it appears that there was no opportunity for such application, that such application would be futile (as where the wrongdoers control the corporation), or that the delay involved would defeat recovery.[1] In the instant case there is no allega-

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[1] *Hawes* v. *Oakland*, 104 U. S. 450; *Quincy* v. *Steel*, 120 U. S. 241; *Corbus* v. *Alaska Treadwell Gold Mining Co.*, 187 U. S. 455; *Delaware & Hudson Co.* v. *Albany & Susquehanna R. R. Co.*, 213 U. S. 435. See *Macon, D. & S. R. Co.* v. *Shailer*, 141 Fed. Rep. 585.

tion that the United Copper Company is in the control of the alleged wrongdoers or that its directors stand in any relations to them or that they have been guilty of any misconduct whatsoever. Nor is there even an allegation that their action in refusing to bring such suit is unwise. No application appears to have been made to the stockholders as a body or indeed to any other stockholders individually; nor does it appear that there was no opportunity to make it, and no special facts are shown which render such application unnecessary. For aught that appears, the course pursued by the directors has the approval of all the stockholders except the plaintiffs. The fact that the cause of action is based on the Sherman Law does not limit the discretion of the directors or the power of the body of stockholders; nor does it give to individual shareholders the right to interfere with the internal management of the corporation.

But even if the circumstances were such as to justify individual stockholders in seeking the aid of the court to enforce rights of the corporation, it is clear that their remedy is not at law.[3] The particular equitable relief [265] sought in *Fleitmann* v. *Welsbach Co.*, 240 U. S. 27, was denied; but this denial affords no reason for assuming that the long settled rule under which stockholders may seek such relief only in a court of equity, will be departed from because the cause of action involved arises under the Sherman Law.

This action was commenced May 3, 1912. The judgment dismissing the complaint was rendered in the district court September 24, 1914, and affirmed by the Circuit Court of Appeals April 13, 1915. The case was entered in this court July 27, 1915. On April 7, 1917, about a fortnight before the case was reached for argument, George D. Hendrickson and Luther Martin, Jr., filed in this court a motion that they be sub-

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[3] *Hawes* v. *Oakland*, 104 U. S. 450, 454; *Quincy* v. *Steel*, 120 U. S. 241. The latter case was an equity suit by a stockholder to enforce a purely legal claim of the corporation—damages for breach of contract; and the court sustained a demurrer to the bill, not because the suit should have been at law, but because the bill failed to show that complainant had made sufficient effort to induce the directors to enter suit.

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stituted as plaintiffs in error. The motion recites that they had, on March 1, 1917, been appointed receivers of the United Copper Company by the Court of Chancery of New Jersey, and had on April 2, 1917, been authorized by it to apply for such substitution. Annexed to the motion is a copy of the petition for appointment of the receivers which alleges that the United Copper Company had on February 28, 1912, been dissolved by proclamation of the Governor of New Jersey for failure to pay franchise taxes; and that it had assets of large value, but that its directors named (who under the statute thereupon became trustees for the corporation) had taken no steps whatever to collect its assets or settle its affairs and were not fit and proper persons to be intrusted with them. Only by opposing affidavits filed by defendants was it disclosed that, on February 10, 1913, more than four years previously, the District Court of the United States for the Southern District of New York had appointed others receivers of the [266] United Copper Company, and had vested in those receivers the possession of "all the properties owned by the defendant [the United Copper Company], or in which the said defendant has any ownership or interest, whether such property be real, personal, or mixed, of whatsoever kind and description, and wheresoever situated, including * * * things in action, credits, stocks, bonds, securities, shares of stock in the corporations described in said bill of complaint, and all shares of stock, certificates of equitable interest and other certificates representing any interest in any property and all other securities of whatsoever character owned by the defendant company, on or in which it has any interest, or which it controls directly or indirectly," and that on February 14, 1913, the same persons had been appointed ancillary receivers by the United States District Court for the District of New Jersey. We have no occasion to consider the power of this court to grant the motion for substitution. See *Railway Co.* v. *Twombly*, 100 U. S. 78, 81. It is without merit and is denied.

Judgment affirmed.

Statement of the Case.

PAINE LUMBER COMPANY, LIMITED, ET AL., *v.* NEAL, INDIVIDUALLY AND AS SECRETARY AND TREASURER OF THE JOINT DISTRICT COUNCIL OF NEW YORK AND VICINITY OF THE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA AND AMALGAMATED SOCIETY OF CARPENTERS AND JOINERS OF AMERICA, ET AL.[a]

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 24. Argued May 3, 4, 1915; restored to docket for reargument June 12, 1916; reargued October 24, 25, 1916.—Decided June 11, 1917.

[244 U. S. 459.]

A private party can not maintain a suit for an injunction under § 4 of the Sherman Anti-Trust Law.[b]

Such action upon the part of a labor union as is involved in this case is not subject to be enjoined under the laws of New York.

214 Fed. Rep. 82, affirmed.

The case is stated in the opinion.

[460] *Mr. Walter Gordon Merritt* and *Mr. Daniel Davenport* for appellants.

The combination falls within that class of restraints of trade intended to coerce third parties and strangers from engaging in interstate trade except on conditions that the combination imposes, and therefore violates the Federal Anti-Trust Law.

The object is to control conditions of manufacture by preventing the sale and use of manufactured articles unless they come from mills operated and exclusively manned by members of the combination. It is a combination between the sources of production and those who control distribution and consumption, to limit the market to producers joining

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[a] For prior opinions (212 Fed. 259), see vol. 5, p. 482—(214 Fed. 82), see vol. 5, p. 445.

[b] Syllabus and statements of arguments copyrighted, 1917, by The Banks Law Publishing Company.

such combination. According to the defendants' contention, they must protect the union mills from the competition of non-union mills because, under the natural law of trade and competition, the union mills can not survive with their increased cost of production. The rule against using or working on open-shop "trim" was therefore adopted to destroy open-shop competition. The Master Carpenters' Association also take active steps to enforce this régime in order to protect themselves from the competition of independent contractors using such material.

The conceded purpose is to increase profits and wages in the union mill and to do this by the only possible method by which men working on buildings could accomplish such a purpose, viz, restraining trade or commerce by making open-shop products unsalable. There is no relation between the buildings and the factories except commerce, so that the only way in which the conditions in the mills can be affected by the conduct of the men at the buildings is by controlling commerce.

The union manufacturers and their employees have an undoubted interest in extending the sale and use of any merchandise which is produced by their joint efforts, [461] and may, therefore, justify and excuse any injury which they inflict upon their competitors by the ordinary methods of legitimate competition. They can not, however, by association or combination with journeymen who have no such interest, but exercise a despotic control over the use and installation of such products, destroy the competition of business rivals and monopolize the market. This is no ordinary labor case, but an instance where the defendants are seeking to project their influence into trade and commerce for the purpose of preventing the sale and distribution of completed articles of common use produced by their competitors. It is an attempt to drive open-shop products out of commerce.

The distinction between a combination where parties subject themselves to a self-imposed restraint, and a combination which has also the objective purpose of interfering with outsiders, has been recognized by this court, which holds that the latter combination implies a wrongful purpose. *United States* v. *Patten*, 226 U. S. 525; *Loewe* v. *Lawlor*, 208 U. S.

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274; *Northern Securities Co.* v. *United States*, 193 U. S. 197; *Standard Oil Co.* v. *United States*, 221 U. S. 1; *Thomsen* v. *Union Castle Mail S. S. Co.*, 166 Fed. Rep. 251; *State* v. *Duluth Board of Trade* (Minn.), 121 N. W. Rep. 395; *Brown & Allen* v. *Jacobs Pharmacy* (Ga.), 41 S. E. Rep. 553.

If the object of the combination be the illegal one described, it is immaterial that the means are otherwise innocent and lawful. There is nothing talismanic about the right to strike which excepts it from this universal and wholesome rule of law. *Aikens* v. *Wisconsin*, 195 U. S. 204; *Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 418; *Swift & Co.* v. *United States*, 196 U. S. 375; *United States* v. *Reading Co.*, 226 U. S. 324; *Loewe* v. *Lawlor*, *supra*.

This doctrine that an act otherwise legal may become illegal when exercised in furtherance of an illegal con[462]spiracy has been frequently applied in the case of strikes. [Citing numerous authorities.]

If the means employed are calculated and intended to restrain interstate trade, it is immaterial that they are to be performed or operate entirely within the limits of one State. *Loewe* v. *Lawlor*, *supra; United States* v. *Reading Co.*, *supra; Swift & Co.* v. *United States*, 196 U. S. 375; *Northern Securities Co.* v. *United States*, 193 U. S. 197; *United States* v. *Terminal R. R. Assn.*, 227 U. S. 683.

The case at bar is undistinguishable in principle from the cases of *Montague* v. *Lowry*, 193 U. S. 38; *Loewe* v. *Lawlor*, *supra; Eastern States Retail Lumber Dealers' Assn.* v. *United States*, 234 U. S. 600; and *Lawlor* v. *Loewe*, 235 U. S. 522. The judges in the lower court entertained no doubt as to the applicability of the Anti-Trust Law. *Irving* v. *Neal*, 209 Fed. Rep. 471; *Paine* v. *Neal*, 212 Fed. Rep. 259 (case at bar).

The complainants, being irreparably injured in their property rights by acts in violation of the Anti-Trust Law, are entitled to an injunction. The jurisdiction of the district court was invoked both on account of diversity of citizenship and the Anti-Trust Law. The complainants appealed to its general equitable powers to protect them from irreparable injury to their property rights by unlawful and criminal acts. To deny the power and duty of the chancellor to protect property rights from irreparable injury due to criminal

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acts, involves an overthrow of fundamental principles and unfortunate consequences which would be far-reaching. If the Federal Anti-Trust Law supersedes all other law relative to combinations which restrain interstate trade and is to be construed as denying the right of an injunction to a private party, then persons irreparably injured in their property rights by such criminal acts, which were exclusively in restraint of interstate trade, would be deprived of their property without due process of law. The Federal statute is only [463] declaratory of the common law without adding to or subtracting from the substantive offense; it specifies the remedies of treble damages, confiscation, and injunction by the Government, which were not available under the common law, and, by making restraints which were purely subjective in their nature affirmatively unlawful, entitles a private party suffering damage therefrom to all available civil remedies. Since the law does not lay down any new rule as to combinations which are legal or illegal, the remedies which it prescribes are cumulative and do not exclude common-law remedies.

The law should be construed with a view to suppressing the mischief and advancing the remedy for which it is obviously designed, and to carry with it all the incidents and available remedies which usually accompany such statutes. Upon this question, however, the lower courts are in disagreement.

The cases holding that parties injured by acts in violation of this law are entitled to an injunction under general equitable principles are as follows: *Bigelow* v. *Calumet & Hecla Mining Co.*, 155 Fed. Rep. 877; affd. 167 Fed. Rep. 721; *United States* v. *Addyston Pipe & Steel Co.*, 85 Fed. Rep. 279; *Mannington* v. *Hocking Valley Ry. Co.*, 183 Fed. Rep. 140; *De Koven* v. *Lake Shore & Michigan Southern Ry. Co.*, 216 Fed. Rep. 955; *Hitchman Coal & Coke Co.* v. *Mitchell*, 202 Fed. Rep. 512; *Walsh* v. *Association of Plumbers* (Mo.), 71 S. W. Rep. 455. [Counsel then cited contrary decisions of the lower Federal courts, a number of which are mentioned in the dissenting opinion.]

It is our contention that under general principles any person specially injured in his property rights by criminal or

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unlawful acts is entitled to the usual and appropriate civil remedies to protect him therefrom, and that there is nothing in the Sherman Act which deprives him of that right or contracts the power of the district court to grant [464] him injunctive relief. *Hayes* v. *Michigan Central R. R. Co.*, 111 U. S. 228; *Willy* v. *Mulledy*, 78 N. Y. 314; *Mairs* v. *Baltimore & Ohio R. R. Co.*, 175 N. Y. 413; *Huda* v. *American Glucose Co.*, 154 N. Y. 481; *Angle* v. *Chicago & St. Paul Co.*, 151 U. S. 2; *Bitterman* v. *Louisville & Nashville R. R. Co.*, 207 U. S. 206; 1 Rev. Swift's Dig., side page 553; *In re Debs*, 158 U. S. 593, 594; *Cooper* v. *Whittingham*, 15 Ch. Div. 501; *Parker* v. *Barnard*, 135 Massachusetts, 120; *Hayes* v. *Porter*, 22 Maine, 371; *Toledo A. A. & N. M. Ry. Co.* v. *Penn Co.*, 54 Fed. Rep. 730; *Hardie-Tynes Mfg. Co.* v. *Cruse* (Ala.), 66 So. Rep. 657; *Thomas* v. *N. O. & T. P. Ry. Co.*, 62 Fed. Rep. 821.

The fact that Congress has since given a private individual the right to an injunction, by the Clayton Act, seems to indicate what was its intention under the original act.

The complainants have suffered special damages entitling them to injunctive relief.

The defendants' combination violates §§ 340 and 341 of article 22 of the General Business Law of New York, and complainants, being irreparably injured in their property rights by such unlawful acts, are entitled to an injunction.

If the acts of the defendants constitute a misdemeanor under the terms of this State statute, then the plaintiffs are entitled to all the appropriate and usual civil remedies, even though those remedies are not prescribed by the statute. It is the settled law of New York that one who is specially injured by an act forbidden by the criminal law is entitled to civil relief. *Kellogg* v. *Sowerby*, 190 N. Y. 370; *Rourke* v. *Elk Drug Co.*, 77 N. Y. Supp. 374; *Dueber Co.* v. *Howard Co.*, 24 N. Y. Supp. 647; *Straus* v. *American Publishers' Assn.*, 177 N. Y. 473; 193 N. Y. 496; 199 N. Y. 548; 231 U. S. 222; 85 App. Div. 446; *Park & Sons* v. *National Druggists' Assn.*, 175 N. Y. 1; *Locker* v. *American Tobacco Co.*, 195 N. Y. 565. The statute is little more [465] than a codification of the common law. *Matter of Davies*, 168 N. Y. 89; *People* v. *American Ice Co.*, 120 N. Y. Supp. 443. The com-

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modities produced by plaintiffs are included. The motive which actuates the members of the combination is immaterial, but the purpose and object of the combination is material. *Kellogg* v. *Sowerby*, 190 N. Y. 370; *People* v. *American Ice Co.*, 120 N. Y. Supp. 443; *Schwarcz* v. *International Union*, 124 N. Y. Supp. 968; *State* v. *Minneapolis Milk Co.* (Minn.), 144 N. W. Rep. 417. If the plaintiffs are to prevail under this statute, it is because the acts of the defendants constitute a public offense forbidden by the statute and have resulted in injury to the plaintiffs. The character of the participants is immaterial. The fact that the defendants are endeavoring to suppress competition in the supply and price of completed articles in common use removes their combination and conduct from the case of *National Protective Assn.* v. *Cumming*, 170 N. Y. 315, and brings them within the purview of the Anti-Trust Law. *Rourke* v. *Elk Drug Co.*, 77 N. Y. Supp. 375; *Loewe* v. *Lawlor*, 208 U. S. 274.

If the combination of the defendants is illegal, then every act in furtherance thereof, though otherwise innocent and constitutionally protected, becomes illegal because done in furtherance of the illegal purpose. Acts which might be innocent when done by one person may become illegal when done by a number in combination in violation of the statute. *Rourke* v. *Elk Drug Co.*, 77 N. Y. Supp. 375; *Locker* v. *American Tobacco Co.*, 195 N. Y. 565; *Locker* v. *American Tobacco Co.*, 106 N. Y. Supp. 118 (Judge Gaynor's opinion); *Walsh* v. *Dwight*, 58 N. Y. Supp. 91.

Generally as to the application of this law to cases like the present, see *People* v. *McFarlin*, 89 N. Y. Supp. 527; *Irving* v. *Neal*, 209 Fed. Rep. 471; *Paine* v. *Neal*, 212 Fed. Rep. 259; *Gill Engraving Co.* v. *Doerr*, 214 Fed. Rep. 111. Within the meaning of this act defendants' combination [466] (*a*) seeks to create and maintain a monopoly in the manufacture, production, and sale of the articles in question. Their own reports show that they have already acquired a complete monopoly at higher prices of trade in wood trim on the Island of Manhattan, thereby terminating all trade in that borough with any open shops. *People* v. *American Ice Co.*, 120 N. Y. Supp. 443. (*b*) It attempts to restrain or prevent competition in the supply and price

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of these articles. (*c*) It seeks to restrain or prevent the free pursuit of a lawful trade or business, in order thereby to create or maintain a monopoly in the production and sale of these articles. *Straus* v. *American Publishers' Assn.*, *supra; People* v. *McFarlin*, 89 N. Y. Supp. 527; *Cummings* v. *Union Blue Stone Co.*, 164 N. Y. 401; *Arnot* v. *Pittston Coal Co.*, 68 N. Y. 558.

The restraint is not incidental to any legitimate end which the defendants seek, but is the direct purpose of the combination. The benefits sought by the defendants are the result of the restraint of trade, and the restraint of trade is not the result of the benefits or incidental to them.

The defendants' combination violates sub-division 6 of § 580 of article 54 of the Penal Law of New York; also subdivision 5 of § 580 of that law; also § 530 of article 48 of that law.

Section 582 of the Penal Law of New York is declaratory of the common law and does not legalize the defendants' acts.

A combination of traders, to promote their own interests by suppressing the competition of rivals, is illegal at common law and it is immaterial whether the combination aims at one rival or a class of rivals. If the complainants are being irreparably injured in their property rights by unlawful acts committed within the State, they would be entitled to relief regardless of the existing Federal law, whether those acts were unlawful at common law or because of some State statute.

[467] The facts establish a combination to cause strikes against customers of complainants for the purpose of preventing the sale of their products as long as they operate an open shop, and is, in effect, a secondary boycott of the complainants, which is unlawful. [Citing many authorities.]

The combination of defendants to bring about the employment of members of their organization exclusively in their industry throughout an entire community is unlawful. [Counsel here went into an analysis of the means employed and the rights affected and dangers involved, referring to numerous authorities.]

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The relief prayed for will not interfere with the legal provisions of any of the arbitration agreements.

Complainants are entitled to an injunction under § 16 of the Clayton Act, of October 15, 1914. This section is declaratory of ancient common-law principles and is highly remedial, and should be construed so as to advance the remedy. It was meant to remove doubt arising from divergent Federal decisions, and is to be taken as a legislative construction of the prior law, of retrospective operation, applicable to pending suits like this. *Bailey* v. *Clark*, 21 Wall. 284; *Tiger* v. *Western Investment Co.*, 221 U. S. 286; *Missouri Pacific Ry. Co.* v. *United States*, 189 U. S. 274; *Dinsmore* v. *Southern Express Co.*, 183 U. S. 115; *Sampeyreac* v. *United States*, 7 Pet. 222; *United States* v. *The Schooner Peggy*, 1 Cranch. 105.

It was not the intention by § 6 of the Clayton Act to change in any respect the Sherman Anti-Trust Act as it had been construed and applied by this court in any case. The history of the legislation, shown by the committee reports and even the debates in Congress, establishes this. Moreover, the act in § 4 re-enacts, word for word, § 7 of the Sherman Anti-Trust Act, under which the Loewe case was brought to and decided by this court, without excepting that or any other case from its provisions, [468] which action, upon established principles of construction, is an adoption by Congress of the doctrines of that case.

The presence of § 6 in the act is due to the fact that it was thought desirable to put at rest the contentions of some, that the existence of labor unions for legitimate purposes was forbidden by the Sherman Anti-Trust Act.

Section 20 of the Clayton Act has obviously no application since here the relation of employer and employee does not exist actually or prospectively between the contending parties.

It is further obvious that the various acts mentioned in § 20, against which injunctions shall not issue in this limited class of cases, are most of them acts which in and of themselves are ordinarily lawful, and that this section accomplishes no other purpose than to declare the previously existing law on this subject. The recognition of a right by a statute, such as the Clayton Act, will not justify the exercise of that right

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in furtherance of a criminal conspiracy, which is expressly defined by the same statute. *Aikens* v. *Wisconsin*, 195 U. S. 194; *Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 439.

Otherwise construed, the Clayton Law would be unconstitutional as class legislation, and depriving persons of property without due process of law. *Cleland* v. *Anderson*, 66 Nebraska, 252; *Connolly* v. *Union Pipe Co.*, 184 U. S. 540.

It is proper for the complainants to unite as co-plaintiffs since they were all similarly affected by the same combination.

Mr. Charles Maitland Beattie for the labor union appellees.

Mr. Frederick Hulse for appellees.

Mr. Anthony Gref, *Mr. Charles J. Hardy*, and *Mr. Fred-* [469]*erick P. Whitaker* filed a brief in behalf of appellee, James Elgar, Inc.

Mr. Justice Holmes delivered the opinion of the court.

This is a bill in equity brought by corporations, of States other than New York, engaged in the manufacture of doors, sash, etc., in open shops, against officers and agents of the United Brotherhood of Carpenters and Joiners of America and of the New York branch of the same, certain union manufacturers of doors, sash, etc., members of the Manufacturing Wood Workers' Association, and many master carpenters, members of the Master Carpenters' Association, whose business is to install such products in buildings. The bill was dismissed by the district court, 212 Fed. Rep. 259, and the decree was affirmed by the Circuit Court of Appeals. 214 Fed. Rep. 82; 130 C. C. A. 522.

The bill alleges a conspiracy of the members of the brotherhood and the New York branch to prevent the exercise of the trade of carpenters by any one not a member of the brotherhood, and to prevent the plaintiffs and all other employers of carpenters not such members from engaging in interstate commerce and selling their goods outside of the State where the goods are manufactured, and it sets out the usual devices of labor unions as exercised to that end. In 1909 the master carpenters, coerced by the practical necessities of the case,

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made an agreement with the New York branch, accepting a previously established joint arbitration plan to avoid strikes and lockouts. This agreement provides that "there shall be no restriction against the use of any manufactured material except non-union or prison made;" the arbitration plan is confined to shops that use union labor and the employers agree to employ union labor only. The unions will not erect material made by non-union mechanics. [470] Another agreement between the Manufacturing Wood Workers' Association, the brotherhood, and the New York branch also adopts the plan of arbitration; the labor unions agree that "none of their members will erect or install non-union or prison made material," and the woodworkers undertake that members of the brotherhood shall "be employed exclusively in the mills of the Manufacturing Wood Workers' Association." It is found that most of the journeymen carpenters in Manhattan and part of Brooklyn belong to the brotherhood, and that owing to their refusal to work with non-union men and to employers finding it wise to employ union men, it is very generally impracticable to erect carpenter work in those places except by union labor. It also is found that owing to the above provisions as to non-union material the sale of the plaintiffs' goods in those places has been made less. The workmen have adopted the policy complained of without malice toward the plaintiffs, as part of a plan to bring about "a nation-wide unionization in their trade."

An injunction is asked against the defendants' (other than the master carpenters) conspiring to refuse to work upon material made by the plaintiffs, because not made by union labor; or enforcing by-laws intended to prevent working with or upon what is called unfair material; or inducing persons to refuse to work for persons purchasing such material, or taking other enumerated steps to the same general end; or conspiring to restrain the plaintiffs' interstate business in order to compel them to refuse to employ carpenters not members of the brotherhood. It is prayed further that the provision quoted above from the master carpenters' agreement and another ancillary one be declared void and the parties enjoined from carrying them out. No other or alternative relief is prayed. The ground on which the in-

junction was refused by the district court was that, although it appeared that the agreements above mentioned were parts of a comprehen[471]sive plan to restrain commerce among the States, the conspiracy was not directed specially against the plaintiffs and had caused them no special damage, different from that inflicted on the public at large. The Circuit Court of Appeals, reserving its opinion as to whether any agreement or combination contrary to law was made out, agreed with the judge below on the ground that no acts directed against the plaintiffs personally were shown.

In the opinion of a majority of the court if the facts show any violation of the act of July 2, 1890, c. 647, 26 Stat. 209, a private person can not maintain a suit for an injunction under § 4 of the same, *Minnesota* v. *Northern Securities Co.*, 194 U. S. 48, 70, 71, and especially such an injunction as is sought; even if we should go behind what seems to have been the view of both courts below, that no special damage was shown, and reverse their conclusion of fact. No one would maintain that the injunction should be granted to parties not showing special injury to themselves. Personally, I lay those questions on one side, because, while the act of October 15, 1914, c. 323, § 16, 38 Stat. 730, 737, establishes the right of private parties to an injunction in proper cases, in my opinion it also establishes a policy inconsistent with the granting of one here. I do not go into the reasoning that satisfies me, because upon this point I am in a minority.

As this court is not the final authority concerning the laws of New York, we say but a word about them. We shall not believe that the ordinary action of a labor union can be made the ground of an injunction under those laws until we are so instructed by the New York Court of Appeals. *National Protective Association of Steam Fitters & Helpers* v. *Cumming*, 170 N. Y. 315. Certainly the conduct complained of has no tendency to produce a monopoly of manufacture or building since the more successful it is the more competitors are introduced into the trade. Cases like *Kellogg* v. *Sowerby*, 190 N. Y. 370, [472] concerning conspiracies between railroads and elevator companies to prevent competition, seem to us very clearly not to have been

intended to overrule the authority that we cite, and not to have any bearing on the present point.

Decree affirmed.

Mr. Justice PITNEY, with whom concurred Mr. Justice McKENNA and Mr. Justice VAN DEVANTER, dissenting.

Appellants, who were complainants below, filed their bill in the United States Circuit Court (afterwards District Court) in the month of February, 1911, to obtain an injunction against the prosecution of a conspiracy to restrain interstate trade and commerce in the products of complainants' wood-working mills and destroy their interstate business by means of a boycott. The Federal jurisdiction was invoked both on the ground of diverse citizenship and on the ground that the action arose under the Sherman Anti-Trust Act of July 2, 1890, c. 647, 26 Stat. 209. Upon the merits, the laws of the State of New York were relied upon, as well as the Federal act. (General Business Law of N. Y., § 340; Penal Law of N. Y., § 580, subd. 6.)

It was found by the District Court (212 Fed. Rep. 259, 263, 266) that the defendants were engaged in a combination directly restraining competition between manufacturers and operating to restrain interstate commerce, in violation of both Federal and State acts. The Circuit Court of Appeals assumed this to be so (214 Fed. Rep. 82), and there is no serious dispute about it here. The District Court dismissed the bill, upon the ground that injunctive relief under either statute could be had only at the instance of the United States, or the State of New York, as the case might be, and therefore complainants could not have relief in this suit; citing *National Fireproofing* [478] *Co.* v. *Mason Builders' Association*, 169 Fed. Rep. 259, 263. The Circuit Court of Appeals affirmed the decree upon the ground that defendants' acts were not malicious and not directed against the individual complainants personally, and hence relief by injunction could not be granted, irrespective of whether the particular combination in question was obnoxious either to the common law or to the statutes. This decision was rendered on April 7, 1914.

In this court, the prevailing opinion is that, although the facts show a violation of the Sherman Act, a private person can not maintain a suit for an injunction under its fourth section. I dissent from the view that complainants can not maintain a suit for an injunction, and I do so not because of any express provision in the act authorizing such a suit, but because, in the absence of some provision to the contrary, the right to relief by injunction, where irreparable injury is threatened through a violation of property rights and there is no adequate remedy at law, rests upon settled principles of equity that were recognized in the constitutional grant of jurisdiction to the courts of the United States. I think complainants were entitled to an injunction also upon grounds of State law; but will confine what I have to say to the Federal question.

The proofs render it clear that defendants are engaged in a boycotting combination in restraint of interstate commerce prohibited by and actionable under the Sherman Law, on the authority of *Montague & Co.* v. *Lowry*, 193 U. S. 38, 44–48; *Loewe* v. *Lawlor*, 208 U. S. 274, 292, *et seq.; Eastern States Retail Lumber Dealers' Assn.* v. *United States*, 234 U. S. 600, 614; *Lawlor* v. *Loewe*, 235 U. S. 522, 534. The proof is clear also that the conspiracy is aimed at the property rights of complainants in particular; certainly that it is designed to injure directly and drive out of business a limited class of traders—the so-called "non-union" wood-working mills—to which complainants belong; that complainants are sustaining direct [474] and serious injury through the closing of the channels of interstate trade to their products, an injury quite different from that suffered by the public in general; and that it is a continuing injury not adequately remediable by the ordinary action at law or the action for treble damages under the Sherman Act, and hence is an irreparable injury in the sight of equity. That there is no particular animosity toward complainants as individuals—assuming it to be true—is, in my view, a matter of no consequence. If evidence of malice be necessary (and I do not think it is), this is only in the sense that malice consists in the intentional doing of an unlawful act, to the direct damage of another, without just

cause or excuse. *Brennan* v. *United Hatters*, 73 N. J. L. 729, 744.

Free access to the markets through unobstructed channels of commerce is the very breath of the life of such manufacturing establishments; and to say that complainants are not specially injured by the conduct of defendants seems to me to require that the eyes be closed to the evidence in the case and to the familiar facts of commerce. I do not understand either of the courts below to have held as matter of fact that complainants were not specially injured; but that the District Court (212 Fed. Rep. 267), while finding in fact that complainants were directly injured, reasoned (erroneously, as I think,) that it was not such special injury as was contemplated by certain New York decisions cited.

Section 1 of the Sherman Act declares that every combination or conspiracy in restraint of trade or commerce among the several States or with foreign nations is illegal, and imposes a punishment of fine or imprisonment upon the guilty parties. It clearly recognizes, what is well known, that injury to other traders and competitors is the primary effect of such a combination. A right of action for damages by a party specially aggrieved would have followed by implication (*Texas & Pacific Ry. Co.* [475] v. *Rigsby*, 241 U. S. 33, 39); and it was doubtless because treble damages were to be allowed that an express authorization of suit at law was included in the act. Section 7.

The fourth section provides: "The several Circuit Courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations," etc. The act was designed to be highly remedial, so far as *preventing* restraints of trade and commerce is concerned, and the semicolon in the sentence just quoted indicates, as I think, that the grant of jurisdiction was intended to be general, and that the following clause was intended to impose a special duty upon the district attorneys to resort to that jurisdiction

whenever, in the discretion of the Attorney General, a public prosecution should seem to be called for.

Nor is the omission of an express declaration that persons threatened with special injury through violations of the act may have relief by injunction, of particular significance. Declarations of that character are rarely met with in the legislation of Congress.[1] The reason is not far to seek. By § 2 of Article III of the Constitution, the judicial power is made to extend to "all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States," etc. This had the effect of adopting equitable remedies in all cases arising under the Consti[476]tution and laws of the United States where such remedies are appropriate. The Federal courts, in exercising their jurisdiction, are not limited to the remedies existing in the courts of the respective States, but are to grant relief in equity according to the principles and practice of the equity jurisdiction as established in England. *Robinson* v. *Campbell*, 3 Wheat. 212, 221, 223; *United States* v. *Howland*, 4 Wheat. 108, 115; *Irvine* v. *Marshall*, 20 How. 558, 565. In *United States* v. *Detroit Lumber Co.*, 200 U. S. 321, 339, the court, by Mr. Justice Brewer, declared: "It is a mistake to suppose that for the determination of equities and equitable rights we must look only to the statutes of Congress. The principles of equity exist independently of and anterior to all Congressional legislation, and the statutes are either annunciations of those principles or limitations upon their application in particular cases."

To speak accurately, it is not the statute that gives a right to relief in equity, but the fact that in the particular case the threatened effects of a continuing violation of the statute are such as only equitable process can prevent. The right to equitable relief does not depend upon the nature or source of the substantive right whose violation is threatened, but

[1] Section 16 of the so-called Clayton Act of October 15, 1914, c. 323, 38 Stat. 730, 737, contains such a provision; but this was inserted only because some of the Federal courts had held—erroneously, as I think—that private parties could have no relief by injunction against threatened violations of the Sherman Act. These decisions will be discussed below.

upon the consequences that will flow from its violation. As the court, by Mr. Justice Field, declared in *Holland* v. *Challen*, 110 U. S. 15, 25; "If the controversy be one in which a court of equity only can afford the relief prayed for, its jurisdiction is unaffected by the character of the questions involved."

To take a familiar example: The Constitution of the United States does not declare in terms that infringements of the rights thereby secured may be prevented by injunction. Ordinarily they may not be. It is only where a threatened infringement will produce injury and damage for which the law can afford no remedy—such, for instance, as irreparable and continuing damage, or a [477] multiplicity of suits—that resort may be had to equity; and when this does appear, the right to an injunction arises because that is the only appropriate relief. *Osborn* v. *United States Bank*, 9 Wheat. 738, 838–845; *Pennoyer* v. *McConnaughy*, 140 U. S. 1, 12, 18; *Fargo* v. *Hart*, 193 U. S. 490, 503.

So, tax laws rarely, if ever, contain express authorization of an injunction to restrain illegal taxes. And a suit in equity will not lie on the mere ground that a tax is illegal. But if, in addition, enforcement of the tax would lead to a multiplicity of suits, or produce irreparable injury, or if the property taxed is real estate and the tax throws a cloud upon the title, equity will interfere by injunction. *Dows* v. *City of Chicago*, 11 Wall. 108, 112; *Hannewinkle* v. *Georgetown*, 15 Wall. 547; *Union Pacific Ry. Co.* v. *Cheyenne*, 113 U. S. 516, 525; *Pacific Express Co.* v. *Seibert*, 142 U. S. 339, 348; *Ogden City* v. *Armstrong*, 168 U. S. 224, 237; *Ohio Tax Cases*, 232 U. S. 576, 587.

The fact that the threatened invasion of plaintiffs' rights will amount at the same time to an offense against the criminal laws is no bar to relief by injunction at the instance of a private party. *In re Debs*, 158 U. S. 564, 593.

I find nothing in the letter or policy of the Sherman Act to exclude the application of the ordinary principles of equity, recognized in the constitutional grant of jurisdiction. Applying them to the facts of the present case, appellants are entitled to an injunction to restrain the threatened, con-

tinuing, and irreparable injury and damage that otherwise will result from defendants' violation of the act.

The special duty imposed upon the Attorney General and the district attorneys is not inconsistent with this view. The field to be covered by such public prosecutions, and the objects sought thereby, are quite different from the scope and effect of an injunction granted to a private party threatened with special and irreparable injury to [478] his property rights through a violation of the act. The proceeding by the district attorney is a kind of equitable *quo warranto*, calculated to bring the entire combination to an end, whether it be in the form of a corporation or otherwise. But there may be and are cases of direct and irreparable injury to private parties resulting from violations of the act, not capable of being redressed through actions at law under § 7; and justice to the parties aggrieved requires that the act be construed, if the language admits of such a construction (and I think it does), so as to allow an injunction to prevent irreparable injury to a private party, otherwise remediless, without going to the extent of dissolving the combination altogether, which in some cases might not be a matter of public interest or importance. Unless so construed, the act must operate in many instances to deprive parties of a right of injunction that they would have had without it. So far at least as boycotting combinations are concerned—and this case is of that character—the act creates no new offense and gives no new right of action. *Temperton* v. *Russell*, 1893, 1 Q. B. Div. 715; *Quinn* v. *Leathem*, 1901, A. C. 495; *Barr* v. *Essex Trades Council*, 53 N. J. Eq. 101, 112-121; *Jonas Glass Co.* v. *Glass Bottle Blowers' Assn.*, 77 N. J. Eq. 219, 225.

I find no controlling decision in this court. *Minnesota* v. *Northern Securities Co.*, 194 U. S. 48, 71, is not an authority against the right of complainants to an injunction to prevent special and irreparable damage to their property rights through a violation of the Sherman Act; the effect of that decision being merely to deny relief by injunction to individuals not directly and specially injured. There the State of Minnesota sued in one of its own courts under certain statutes of its own, as well as under the Sherman Act, and the case was removed to the United States Circuit Court as

being one arising under the Constitution and laws of the United States. The purpose of [479] the suit was to annul an agreement and suppress a combination alleged to exist between the defendant railroad corporations; and the only threatened injury because of which an injunction was prayed was that the State being the owner of large tracts of land whose value depended upon free and open competition over the lines of railway involved in the combination, and being the owner of certain public institutions whose supplies must of necessity be shipped over the same railways, it was alleged that the successful maintenance of these institutions as well as the performance by the State of its governmental functions depended largely upon the value of real and personal property situate within the State and the general prosperity and business success of its citizens, and that these in turn depended upon maintaining free and unrestricted competition between the railway lines involved. The court, by Mr. Justice Harlan, said (p. 70) that the threatened injury was at most only remote and indirect, and such as would come alike, although in different degrees, to every individual owner of property in a State by reason of the suppression of free competition between interstate carriers, and was "not such a direct, actual injury as that provided for in the seventh section of the statute;" and that upon the view contended for, "every individual owner of property in a State may, upon like general grounds, by an original suit, *irrespective of any direct or special injury to him* [italics mine], invoke the original jurisdiction of a Circuit Court of the United States, to restrain and prevent violations of the Anti-Trust Act of Congress." It was said further (p. 71): "Taking all the sections of that act together, we think that its intention was to limit direct proceedings in equity to prevent and restrain *such violations* of the Anti-Trust Act *as cause injury to the general public, or to all alike, merely from the suppression of competition* in trade and commerce among the several States and with foreign nations, *to those instituted* [480] *in the name of the United States.* * * * Possibly the thought of Congress was that by such a limitation upon suits in equity of a general nature to restrain violations of the act, *irrespective of any direct injury sustained by particular per-*

sons or corporations, interstate and international trade and commerce and those carrying on such trade and commerce, as well as the general business of the country, would not be needlessly disturbed by suits brought, on all sides and in every direction, to accomplish improper or speculative purposes." [Italics mine.] The reasoning manifestly proceeds upon the assumption that individuals sustaining direct and irreparable injury through a continuing violation of the act would be entitled to an injunction.

Wilder Mfg. Co. v. *Corn Products Refining Co.*, 236 U. S. 165, 174, 175, is not in point. There plaintiff in error, which had purchased, received, and consumed goods from defendant in error, defended a suit for the price upon the ground that defendant in error was an illegal combination in violation of the Sherman Act, and therefore could not sue to recover for goods sold with direct reference to and in execution of agreements that had for their object and effect the accomplishment of the illegal purposes of the combination. The court held that an individual could not defend a suit brought against him on his otherwise legal contract by asserting that the corporation or combination suing had no legal existence because of its violations of the act, the statute having cast upon the Attorney General of the United States the responsibility of enforcing its provisions in that regard.

The question whether private parties threatened with injury through violations of the Sherman Act might (prior to the Clayton Act of October 15, 1914, c. 323, § 16, 38 Stat. 730, 737) have relief by injunction is one upon which the lower Federal courts are not in accord. In the present case the District Court, in dismissing the bill upon the [481] ground that relief by injunction might be had only at the instance of the United States (212 Fed. Rep. 259, 266), merely cited and relied upon *National Fireproofing Co.* v. *Mason Builders' Association*, 169 Fed. Rep. 259, 263. That case was decided upon the authority of *Greer* v. *Stoller*, 77 Fed. Rep. 1, 3, and *Southern Indiana Exp. Co.* v. *United States Exp. Co.*, 88 Fed. Rep. 659, 663. Reference was made also to *Bement* v. *National Harrow Co.*, 186 U. S. 70, 87, 88, where the point was assumed *arguendo; Post* v. *Railroad*, 103 Tennessee, 184, 228, where it was ruled on the authority of 86 Fed. Rep. 407

and 88 Fed. Rep. 659, 663; and the following cases in the Federal courts: *Blindell* v. *Hagan* (C. C.), 54 Fed. Rep. 40, 41; *Hagan* v. *Blindell* (C. C. A.), 56 Fed. Rep. 696; *Pidcock* v. *Harrington* (C. C.), 64 Fed. Rep. 821; *Gulf &c. R. Co.* v. *Miami Steamship Co.* (C. C. A.), 86 Fed. Rep. 407, 420; *Block* v. *Standard Distilling &c. Co.* (C. C.), 95 Fed. Rep. 978; and *Metcalf* v. *American School-Furniture Co.* (C. C.), 108 Fed. Rep. 909. An examination of these cases (including *Greer* v. *Stoller* and *Southern Indiana Exp. Co.* v. *United States Exp. Co.*, *supra*) discloses that *Blindell* v. *Hagan*, 54 Fed. Rep. 40, 41, is the source from which all the others derive the only authority they have for the doctrine that under the Sherman Act the remedy by injunction was available to the Government only. But one or two of the cases contain any reasoning upon the question, and that is meager and unsatisfactory.

Moreover, so far as these cases have held that private parties could have no injunction for a violation of the Sherman Act (some of them have not so held), the real ground of decision in *Blindell* v. *Hagan* was misunderstood. In that case the jurisdiction of the Federal court was invoked upon the ground of the alienage of complainants, defendants being citizens of the State of Louisiana, and also upon the ground that defendants were engaged in a combination in restraint of trade between New Orleans [482] and Liverpool, contrary to the prohibition of the Sherman Act. The Circuit Court, in declining to allow an injunction under the act, said: "This act makes all combinations in restraint of trade or commerce unlawful, and punishes them by fine or imprisonment, and authorizes suits at law for triple damages for its violation, but it gives no new right to bring a suit in equity, and a careful study of the act has brought me to the conclusion that suits in equity or injunction suits by any other than the Government of the United States are not authorized by it." Evidently this was intended to be confined to the question of an express authorization of an injunction for a mere violation of the act, for the court proceeded to grant preventive relief on the ground that there was jurisdiction because of the citizenship of the parties, and that under the ordinary equity jurisdiction an injunction should issue because of the threatened irreparable injury and the inadequacy of pecu-

niary compensation, and in order to prevent a multiplicity of suits. Upon appeal the decree was affirmed upon the grounds expressed by the court below, 56 Fed. Rep. 696. Since there was no infringement of complainants' rights except through a combination in restraint of foreign trade, as to which manifestly the Sherman Act furnished the exclusive rule of law, the effect of the decision is to allow an injunction to one injured through a violation of that act if he show in addition the ordinary grounds for resorting to equity, such as the probability of irreparable mischief, the inadequacy of a pecuniary compensation, or the necessity of preventing a multitude of suits.

So, in *Bigelow* v. *Calumet & Hecla Mining Co.* (C. C.), 155 Fed. Rep. 869, 876, the court, after reviewing the previous decisions, declared (p. 877): "They do not commend themselves to my judgment so far as they deny the right of a private party, who has sustained special injury by a violation of the Anti-Trust Act, to relief by [483] injunction under the general equity jurisdiction of the court. As already seen, the cases referred to do not generally announce such rule."

Aside from their rights under the act of 1890, I think appellants are now entitled to an injunction under § 16 of the Clayton Act—the case clearly being within the terms of the section—notwithstanding the act took effect after the final decree in the district court. In an equity suit for injunction the reviewing court should decide the case according to the law as it exists at the time of its decision. This is not giving a retrospective effect to the new statute, for the relief granted operates only *in futuro*.

The suggestion, in behalf of defendants, that § 6 of the Clayton Act [1] establishes a policy inconsistent with relief by

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[1] "SEC. 6. That the labor of a human being is not a commodity or article of commerce. Nothing contained in the Anti-Trust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the Anti-Trust laws."

injunction in such a case as the present, by making legitimate any acts or practices of labor organizations or their members that were unlawful before, is wholly inadmissible. The section prohibits restraining members of such organizations from "*lawfully* carrying out the *legitimate* objects thereof." What these are is indicated by the qualifying words: "instituted for the purposes of mutual help, and not having capital stock or conducted for profit." But these are protected only when "lawfully carried out." The section safeguards these organizations while pursuing their *legitimate* objects by *lawful* means, and prevents them from being considered, merely because organized, to be illegal combinations or conspiracies in restraint of trade. The section, fairly construed, has [484] no other or further intent or meaning. A reference to the legislative history of the measure confirms this view. House Rep. No. 627, 63d Cong., 2d sess., pp. 2, 14–16; Senate Rep. No. 698, 63d Cong., 2d sess., pp. 1, 10, 46. Neither in the language of the section, nor in the committee reports, is there any indication of a purpose to render lawful or legitimate anything that before the act was unlawful, whether in the objects of such an organization or its members or in the measures adopted for accomplishing them.

It is altogether fallacious, I think, to say that what is being done by the present defendants is done only for the purpose of strengthening the union. Conceding this purpose to be lawful, it does not justify or excuse the resort to unlawful measures for its accomplishment. A member of a labor union may refuse to work with non-union men, but this does not entitle him to threaten manufacturers for whom he is not working, and with whom he has no concern, with loss of trade and a closing of the channels of interstate commerce against their products if they do not conduct their business in a manner satisfactory to him.

And the suggestion that, before the Clayton Act, unlawful practices of this kind were usually and notoriously resorted to by labor unions, and that for this reason Congress must have intended to describe them as "legitimate objects," and thus render lawful what before was unlawful, is a libel upon

the labor organizations and a serious impeachment of Congress.

Nor can I find in § 20 of the Clayton Act anything interfering with the right of complainants to an injunction. It refers only to cases "between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment." [485] These words evidently relate to suits arising from strikes and similar controversies, and the committee reports upon the bill bear out this view of the scope of the section. But this is not such a suit. There is no relation of employer and employee, either present or prospective, between the parties in this case. Defendants who are employees are in one branch of industry in New York City; complainants are employers of labor in another branch of industry in distant States. Nor is there any dispute between them concerning terms or conditions of employment. Section 20 prohibits an injunction restraining any person "from ceasing to patronize or to employ any party to *such dispute*, or from recommending, advising, or persuading others by *peaceful and lawful* means so to do; * * * or from peaceably assembling *in a lawful manner, and for lawful purposes;* or from doing any act or thing *which might lawfully be done in the absence of such dispute* by any party thereto."

Clearly, this provision is limited to the participants in a dispute of the character just indicated. And quite as clearly, only "lawful" measures are sanctioned—that is, of course, measures that were lawful before the act. There is no grant, in terms or by necessary inference, of immunity in favor of a boycott of traders in interstate commerce, violative of the provisions of the Sherman Act, to which the Clayton Act is supplemental.

Mr. Justice McReynolds also dissents.

Syllabus.

UNITED STATES *v.* WILLARD C. HOLLIS ET AL.

(District Court, D. Minnesota, Fourth Division. Mar. 14, 1917.)

[Not reported.]

COMBINATION—USE OF "CUSTOMERS' LISTS" TO ACCOMPLISH ILLEGAL PURPOSE.—The Northwestern Lumbermen's Association was a voluntary membership association, having as members retail lumber dealers in the States of Minnesota, Iowa, North and South Dakota, and a part of Nebraska. A principal object of the association was to force the ultimate consumer to buy his lumber from the regular and recognized (by the association) retail dealers operating in the vicinity where such lumber was to be used and to prevent the manufacturer of and wholesale dealer in lumber from selling or shipping direct to consumers. To accomplish this object the association, among other things, issued and furnished to its members so-called "Customers' Lists." These lists were prepared by the secretary, who, at the beginning of each year, would send to each member a circular letter asking for a list of the manufacturers and wholesale dealers with whom the member dealt. This information, when received, was so compiled as to show the customers of the various manufacturers and wholesale dealers in the territory covered by the members of the association. By exchange of lists this information was extended to cover the territory of other similar organizations. When a sale or shipment was made by a manufacturer or wholesale dealer direct to a consumer, the member from that territory would notify the secretary of the sale or shipment, who thereupon would notify the customers of the offending manufacturer or wholesale dealer in regard to the unethical or irregular shipment; whereupon such customers would protest to such manufacturer or wholesale dealer against such sale or shipment. The purpose and effect of such use of the "Customers' Lists" was to coerce manufacturers and wholesale dealers to refrain from selling or shipping lumber direct to consumers. *Held*, That such use of such lists constituted an undue restraint of interstate commerce and will be enjoined.*

THE TEST IS WHETHER COMMERCE IS SUBSTANTIALLY RESTRAINED.—The test is not whether by alleged methods carried out in pursuance of a conspiracy some portion of interstate commerce is annihilated, but whether such commerce is substantially interfered with or restrained.

RESPONSIBILITY OF CONSPIRATORS NOT LESSENED BECAUSE UNLAWFUL MEANS EMPLOYED, IN SOME CASES NOT EFFECTIVE.—The responsibility of those who unlawfully place substantial obstacles in the legitimate channels of interstate commerce is not lessened by the

* Syllabus by the compilers.

fact that some of the persons engaged in such commerce are able by superior agility to surmount the obstacles and that others by strength are able to break them down.

COURT WILL NOT ADJUDICATE EXTENT OF RESTRAINT IF IT BE SUBSTANTIAL.—The court will not adjudicate in mathematical terms the extent of the restraint if the evidence shows that it is substantial.

MOTIVES OF DEFENDANTS IN CARRYING OUT UNLAWFUL PURPOSE IMMATERIAL.—It is immaterial that the motives of the defendants in carrying out the activities described were of the best; the sole inquiry being whether the facts disclosed show an undue restraint of interstate commerce.

In equity. Suit to enjoin an association of retail lumber dealers from carrying out a conspiracy to prevent manufacturers of and wholesale dealers in lumber from selling and shipping lumber direct to consumers. Injunction granted.

Mr. *Blackburn Esterline*, special assistant to the Attorney General, and Mr. *Frank M. Locke*, of counsel.

Mr. *Clark McKercher*, special assistant to the Attorney General, and Mr. *F. H. Watson*, of counsel.

Mr. *George N. Murdock* and Mr. *C. C. Houpt*, United States District Attorney, appeared for the petitioner.

Messrs. *Lancaster, Simpson & Purdy*, Mr. *C. C. Boyle*, Messrs. *Boyle & Howell*, of counsel, Mr. C. D. Joslyn appeared for the defendants.

BOOTH, District Judge.

This is a suit in equity for an injunction brought by the United States against the defendants under the Sherman Anti-Trust Act.

Plaintiff alleges that the defendants at the time of the filing of the bill were and for several years had been engaged in an unlawful conspiracy and combination unduly, unreasonably, and directly to restrain certain described trade and commerce among and between the several States and Territories of the United States, in lumber and lumber products, in violation of the act of Congress approved July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies."

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The bill alleges and the answer admits that the lumber trade is and for many years prior to the filing of the bill has been divided into the following classes:

1. Manufacturers who operate at various points in the United States, receive logs from the forests, and saw them into various sizes and lengths of timber and lumber required by the trade for building and manufacturing purposes, and ship such products from the points of manufacture by railroad or steamship lines through and into the States of the United States to the various markets where such lumber products are required, and specifically through and into the States of Minnesota, North Dakota, South Dakota, Iowa, and Nebraska.

2. Wholesalers who deal in lumber and lumber products, and are usually located at or near large markets or centers of trade. In some cases the wholesaler maintains a yard for receiving and storing the lumber purchased by him from the manufacturer; in other cases the wholesaler does not maintain a yard, but handles the manufactured product through orders from customers transmitted by the wholesaler to the manufacturer.

3. Retailers, located in towns and cities, who receive and store lumber purchased either from wholesaler or manufacturer and sell for building or manufacturing purposes in the city or town where such retail yard is located.

4. Consumers, who are divided into various classes, generally, as follows: (*a*) The constructing builder; (*b*) the converter or manufacturer; (*c*) the United States Government, and sometimes municipalities and railroads; (*d*) the small consumer of lumber for small building, construction, and repair work.

In addition to the foregoing are (1) mail-order houses, who buy either from wholesalers or manufacturers and sell to all classes of customers; (2) coöperative associations, who buy for the benefit of their own members only.

The latter classes are regarded by some as retailers, by others as consumers, and by still others as separate and distinct classes.

The Government charges that the defendants in pursuance of the alleged conspiracy, by various means and methods,

have arbitrarily fixed and maintained divisions and classifications of the lumber trade in interstate commerce, whereby such commerce is unreasonably restrained and competition unreasonably prevented; that the purpose and effect of the acts of the defendants, pursuant to said conspiracy, are:

1. To unreasonably eliminate or restrict competition, except as between retail yards, for the trade of (*a*) contractors and builders; (*b*) mail-order houses; (*c*) coöperative yards; (*d*) the ultimate consumer, except possibly some consumers, such as the United States Government, railroads, grain elevators, etc.

2. To force the ultimate consumer to buy at retail prices from regularly established and organized retail lumber merchants recognized by retail associations.

3. To force the ultimate consumer to buy from the regular and recognized retail merchant who is operating a yard in the vicinity where such lumber is to be used.

4. To prevent any wholesale dealer or manufacturer from quoting prices or selling and shipping to consumers.

The main question in the case is whether at the time of the filing of the bill the defendants were engaged in a conspiracy in restraint of interstate commerce as charged in the bill. The Government claims that the conspiracy was formed long before the filing of the bill, and that it has been a continuing one, with activities thereunder, differing in kind at various periods, but all directed to the same unlawful ends.

The defendants by their joint and several answer deny the existence of any conspiracy amongst the defendants at any time, and while admitting certain declarations and activities on the part of some and perhaps all of the defendants prior to 1907, which might be considered of doubtful legality, nevertheless claim and allege that since the adoption of the new constitution by the Northwestern Lumbermen's Association in January, 1907, not only no conspiracy has existed between the various defendants or any of them, but there have been no acts or declarations on the part of the defendants or any of them the legality of which can be called in question.

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In the view I take of the evidence it will not be necessary to determine the question what relief, if any, could be granted if it should be found that defendants or some of them were guilty of conspiracy as charged and with activities as charged, prior to 1907, but if it should be also found that there were no activities under such conspiracy since 1907, but merely the continued existence of the conspiracy potential in restraint of trade, but not actually so. The record does not present the situation.

No review of the thousands of pages of testimony and exhibits introduced in the case will be attempted, but it may be useful to state some of the salient facts disclosed by the evidence.

The Northwestern Lumbermen's Association, organized in 1890, is a voluntary-membership association, having as members retail lumber dealers in the States of Minnesota, Iowa, North Dakota, South Dakota, and part of Nebraska. In the earlier years wholesale dealers were admitted as honorary members. In the original constitution is found the following:

"The title of this association shall be the Northwestern Lumbermen's Association, and it shall have for its object the protection of its members against sales by wholesale dealers and manufacturers to contractors and consumers, and the giving of such other protection as may be within the limits of the coöperative association."

And in section 3 of the by-laws is found the following, referring to sales by wholesale dealers to consumers:

"If the manufacturer or wholesale dealer refuse to abide by the decision of the board of directors, it shall be the duty of the secretary to notify the members of the association of the name of such wholesale dealer or manufacturer. If any member continues to deal with such wholesaler or manufacturer, he shall be expelled from the association."

Also the following:

"It shall be contrary to the spirit of this organization for one retailer who may be a member of this organization to ship lumber in car lots into the territory of any other retailer who may also be a member of this association."

Also:

"The secretary shall prepare and cause to be published every three months a list of all the members of this association, both active and

honorary, and mail the same to all retailers. Also the list of all wholesale dealers and manufacturers of lumber who shall refuse to comply with the rules prescribed in section 8 of the by-laws, and mail one of each of such lists to the members of this association."

Also:

"It shall be competent for this association to exchange its blacklist for a similar list of wholesale dealers who may be reported, as provided for in section 8 of these laws, with any other association which may have a membership in whole or in part in the territory covered by this organization. The spirit of this section being that there shall be reciprocity between associations whose object shall be the protection of retailers against wholesalers selling to contractors and consumers."

Changes in the constitution and by-laws were made from time to time.

In 1895 in a declaration of principles occurs the following:

"We seek to establish the equitable principle that the retailer shall not be subjected to competition with the parties from whom he buys; that a fair opportuity shall be offered the man who invests his time and money in the retail business and assumes the risk which such business inevitably involves, to earn an adequate remuneration for his labor and the use of his capital. We also seek to promote that spirit of harmony in the trade which shall prompt every retail dealer to maintain friendly relations with his competitors at home and his brother retailers everywhere."

Among the by-laws at this time are the following:

"The secretary shall prepare and cause to be issued as often as once each month, what shall be known as the 'official bulletin,' which shall contain a record of the facts in connection with all claims which shall come to his office. The 'official bulletin' shall be mailed under sealed covers only to active members of this association, for their private and confidential use, and no case shall be reported therein until the shipper is first given a reasonable opportunity to explain his position in the matter. The 'official bulletin' shall also contain a list of those not in harmony with this association as provided in section 8 of these by-laws, a list of those against whom there are unadjusted complaints, and a complete list of members of this association, both active and honorary.

"The secretary shall also send a complete list of the members of this association to all manufacturers of or wholesale dealers in lumber who ship into the territory covered by this association as often as shall be deemed necessary by the board of directors."

In the constitution of 1897 the following appears:

"It shall be contrary to the spirit of this association for any of its members to make or cause to be made shipments into the legitimate

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territory of members of other associations of retail lumber dealers, and members who shall so offend shall be subject to such discipline as may be provided in the rules of this association.

"Any person or persons, whether carrying a stock of lumber or not, making a practice of quoting prices, selling, or shipping (to other than regular dealers) lumber, sash, doors, etc., into territory under the protection of this association, where said person or persons have no yards, shall be designated as 'poachers.' When said poachers are reported in the membership list and notification sheet they will be considered as consumers at points other than where they may own yards, and any wholesaler or manufacturer, or their agents, making sales or shipments to said parties into the territory of any member of this association after being thus reported will be considered as having sold or shipped to a consumer."

In 1901 a new constitution and declaration of principles was adopted containing the following:

"We recognize the right of manufacturers and wholesalers to sell in whatever market, to whatever purchaser, and at whatever price they may see fit.

"We claim for ourselves, both individually and collectively, the right to buy of such manufacturers or wholesalers or their agents, as we may prefer, and to refrain from buying of those who disregard the equities of the trade to our injury and the demoralization of the retail lumber business.

* * * * * * *

"The sole purpose and object of this association shall be to keep its members constantly informed of those manufacturers and wholesalers who may persist in selling at retail in competition directly or indirectly with any member of this association, to the end that members hereof may refrain from dealing with such manufacturers and wholesalers and their agents, if they or any of them so elect or desire.

"Membership.

"Any person, firm, or corporation within the territory of this association regularly engaged in the retail lumber trade, carrying an assorted stock of lumber, sash, doors, and other building material, reasonably commensurate with the demands of his community, shall be considered a retail lumber dealer and be eligible to membership in this association."

Further changes were made in the constitution in 1903. In this constitution in Article VII appears the following:

"Reports to secretary: Any member of this association having knowledge of a sale by a manufacturer or wholesale dealer or his agents, to a consumer, within the territory of such member, may notify

the secretary of this association in writing, giving as full information in reference thereto as practicable.

* * * * * * *

"Upon receipt of such written notice the secretary shall immediately verify such report so far as practicable, and under the direction of the board of directors shall notify the members of the association of such sale or sales or shipment by such manufacturer or wholesaler."

In the constitution of 1903 appears also the following provisions:

"Article III. Limitations and restrictions.

"Section 1. No rules, regulations, or by-laws shall be adopted in any manner stifling competition, limiting production, restraining trade; regulating prices, or pooling profits.

"Sec. 2. No coercive measures of any kind shall be practiced or adopted toward any retailer, either to induce him to join the association or to buy or refrain from buying of any particular manufacturer or wholesaler. Nor shall any discriminatory practices on the part of this association be used or allowed against any retailer for the reason that he may not be a member of this association, or to induce or persuade him to become such member.

"Sec. 3. No promises or agreements of any kind shall be requisite to membership in this association, nor shall any penalties be imposed upon its members for any cause whatsoever."

Whether these latter provisions were seriously intended to substantially change the aims and purposes or the methods of the association may well be doubted, in view of the activities which the evidence shows were still carried on under this constitution. One of the secretary members of the Lumber Secretaries Bureau of Information (one of the defendants herein), in writing to a brother secretary in May, 1903, in reference to certain similar changes in the constitution of his association, uses the following quaint language:

"A number of our members have asked me what we propose to do since we wiped out all penalties and obligations, and I have answered all of them that every dealer in lumber who is a member of the association has been in business long enough to know just what the object of the association is, and that we propose to protect our members in the same old way as we have been doing, and that it is not necessary to put it down in black and white in our constitution and by-laws, and I have found that they have all been satisfied with the change and feel a good deal freer since we have wiped out all semblance of anything that might be construed by a prejudiced judge as in conflict with the Anti-Trust laws of our several States."

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In 1906-7 the constitution was amended by striking out from the membership clause above quoted the words "considered a retail lumber dealer, and be."

In 1906-7 the constitution was further amended by eliminating Article VII relating to "Reports to secretary."

In the declaration of purpose occurs the following:

"We also recognize the disastrous consequences which result to the legitimate retail dealer from direct competition with wholesalers and manufacturers, and appreciate the importance to the retail dealer of accurate information as to the nature and extent of such competition where any exists."

"And recognizing and appreciating the advantage of coöperation in securing and disseminating any and all proper information for our mutual convenience, benefit, or protection, we have organized this association and have adopted the following articles for the government of our affairs."

Among the articles is the following:

"The object of this association is and shall be to secure and disseminate to its members any and all legal and proper information which may be of interest or value to any member or members thereof in his or their business as retail lumber dealers."

A consideration of the provisions of the several constitutions and by-laws, portions of which are quoted above, in connection with other evidence in the case, leads to the conclusion that among the purposes of the association, at least prior to 1907, were the following: To eliminate competition, except as between retail yards for the trade of the consumer; to force the consumer to buy from a regular organized retail dealer operating a yard in the vicinity where such lumber was to be used, and to prevent the wholesale dealer or manufacturer from selling direct to the consumer.

Various means and methods to bring about the desired results were tried during the period prior to 1907. Expulsion of members, blacklists of offending wholesale dealers, fines, and penalties for offending members; coöperation with other similar associations and the exchange of blacklists and other information; furnishing of information to lumber credit agencies touching the status of various persons, firms, or corporations, whether they should be classed as retailers, coöperative yards, consumers, or otherwise; pub-

lication, alone or in coöperation with other similar associations, of a hand-book for the lumber trade containing, among other things, a list of manufacturers who sold to consumers direct and other non-ethical dealers; formation of the Lumber Secretaries' Bureau of Information for the purpose of coöperation between the different associations of retail lumber dealers in carrying out the aims and purpose above enumerated.

The defendant, the Lumber Secretaries' Bureau of Information, was incorporated in 1902. It grew out of a prior voluntary association known as the Secretaries' Association. Its membership consisted of the secretaries of the various retail lumber associations as representing the associations themselves. During this period the membership increased until 15 associations were represented. The Northwestern Lumbermen's Association was included from 1902 to 1906 and from 1909 continuously.

Article III of the constitution of said bureau is as follows:

"The object for which this bureau is formed is to supply its members with any and all information which may legitimately come into its possession which may be of value or interest to said subscribers."

In December, 1902, a series of resolutions was recommended by said bureau for adoption by the constituent members of the several retail lumber dealers' associations. Among said resolutions were the following:

"Whereas, there are certain manufacturers and jobbers in lumber who seek our trade, and whom we have patronized liberally, who are also seeking the trade of or are supplying the so-called 'poachers' who are invading our territory with catalogues and other demoralizing literature, and who make a business of selling direct to the consumers; and

"Whereas, some manufacturers and jobbers in lumber habitually ship lumber to their customers to points where said customers have no yards and who in fact are 'peddlers;' and

"Whereas, some manufacturers and jobbers in lumber, with no regard for the interests of the retail lumber trade, sell and ship direct to consumers, and also to aggregations of consumers organized as so-called 'coöperative yards;' and

"Whereas, we do not consider such practices to be good ethics, and the lumber trade in general is not in any manner benefited thereby; be it therefore

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"Resolved, That we, the undersigned, in convention assembled, together with any other of our members who may indorse these sentiments and sign with us, do hereby request the secretary of this association as often as once in every 60 days, or at such periods as may be found to be the most practicable, either through his own office or through the Lumber Secretaries' Bureau of Information, to notify us of all such cases as may come to his official notice that we may thereby be kept fully informed and better enabled to distinguish foes as well as friends; and be it further

"Resolved, That our secretary be requested to coöperate with the secretaries of all other State and interstate retail lumber dealers' associations, through the Lumber Secretaries' Bureau of Information, to the end that we may have this information from all retail territory."

Among the activities of the Lumber Secretaries' Bureau of Information was the publication of a bulletin or report published and distributed as outlined in the above resolution. This publication began as early as 1903 and continued as late as 1908.

In December, 1903, said bureau adopted further resolutions, and among others the following:

"To coöperate with the Eastern States Retail Lumber Dealers' Association, an eastern body corresponding to the Lumber Secretaries' Bureau of Information.

"To approve the plan of use of 'customers' lists' proposed by the said Willard G. Hollis, as hereinbefore described.

"To secure reciprocity agreements with the Sash and Door Manufacturers' Association and with the National Lumber Manufacturers' Association."

Statement has been made by counsel for defendants that the Lumber Secretaries' Bureau of Information has since the commencement of this suit terminated its existence. Attention has not been called to anything in the record establishing such to be the fact, and the Government has not admitted it. If deemed advisable, evidence on the matter may be offered before entry of final decree.

In 1890, the Mississippi Valley Lumberman, a weekly newspaper published in Minneapolis, was made the official organ of the Northwestern Lumbermen's Association, and this paper continued to be such official organ, though without formal vote after the first one, until January, 1894, when the Northwestern Lumberman, a Chicago publication, was

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made the official paper for that year. By arrangement made with the latter paper the association was entitled to one page per week in said paper over the signature of the secretary, for such official communications to members as he might choose to make.

The effect of these various activities during the period prior to 1907, is shown. Among other evidence are the statements made from time to time by the members of the association and the Lumber Secretaries' Bureau. In 1903, the president of the association, in his annual address, said:

"We are to-day acting in union with 15 other retail associations representing 5,000 yards, making with our own a total of 7,200 yards, covering territory extending from the western slope of the Alleghenies on the east to the eastern slope of the Rockies on the west, and from Winnipeg down to the 'Sunny South by the Sea.' In this vast territory it is estimated that of all the lumber used in the building trades, 94 per cent of it is confined to its proper channels, reaching the consumer through the retail yards. Possibly this estimate is too high, but it is beyond doubt that the great bulk of irregular shipments have been cut off through the well-directed forces of united efforts.

* * * * * * *

"The idea that in union there is strength has crystallized 15 retail associations into one central organization." (The Lumber Secretaries' Bureau of Information.)

In 1905, Mr. Ewing, at the annual meeting, said:

"I have been on the board for a number of years—ever since the organization of the association.

* * * * * * *

"I want to say, gentlemen, that if this association would go out of existence to-day our whole territory would be covered with men selling lumber to consumers from all the markets of the Northwest direct. You could not keep on your feet. This association has given you more protection than you have ever dreamed of. We want to make it still stronger. We can if you will do your duty and not buy lumber from men that are not in sympathy with us."

Indeed, it is not necessary to go outside of the pleadings to determine the purposes of the defendants, the methods employed by them, and the effect produced during the period prior to 1907.

The answer admits the substance of the allegations of the bill as to these matters, but though making this admission,

defendants deny that there was a conspiracy amongst the defendants or any of them.

A careful consideration of the record, however, leads to the conclusion that if suit had been brought in 1906, and the same admissions and evidence been introduced that are now before the court touching the period prior to 1907, the Government would clearly have been entitled to injunctive relief.

It is but fair to add that the adoption of its original constitution by the Northwestern Lumbermen's Association was prior to the passage of the Sherman Anti-Trust Act; and that many of the activities of this earlier period were thought to be sanctioned by the decision in *Bohn Mfg. Co.* v. *Hollis et al.*, 54 Minn., 223.

Turning next to the period subsequent to the adoption of the 1907 constitution.

As heretofore noted, certain changes are found in the constitution of 1907. The definition of who should be considered retail lumber dealers has been eliminated.

Article VII of the constitution as it existed in 1903, relating to reports to the secretary of the association by members thereof, touching sales by manufacturers and wholesalers direct to consumers, is also eliminated.

In fact, if the constitution of 1907 be considered by itself alone, it affords no substantial basis to sustain the charge of conspiracy alleged in the bill.

Turning now to the activities of the defendant association subsequent to the adoption of the constitution of 1907, it is found that certain of the activities of former years are no longer continued. Expulsion of members, penalties imposed upon members for offenses contrary to the provisions of the constitution or by-laws, are eliminated, so far as the defendant association is concerned.

It is claimed on the part of the Government, however, that with the discontinuance of certain activities others were introduced to take their place, and that these new activities should be considered not merely with reference to the new constitution, but in the light of the whole prior history of the defendants, and that when so considered, the new activi-

ties are found to be inspired by the same purposes, directed to the same ends, and effective to a substantial extent in accomplishing those ends.

Among the activities subsequent to the adoption of the 1907 constitution, are the uses made of certain lumber-trade publications. "The Scout," a trade publication of Detroit, Michigan, is one of these. This publication was made the official organ of the defendant Northwestern Lumbermen's Association for the year 1909. In its columns were published by the secretary of the association lists of wholesalers and manufacturers who made sales which were considered unethical or irregular. In May, 1909, the secretary of the association, in writing to an alleged unethical manufacturer, recites some of the various means theretofore employed in advancing what he calls "The Association Idea." Among other things he mentions: (1) Honorary membership for wholesalers and manufacturers in the retail association; (2) buyers' guide for distribution among the members of the retail association, containing advertisements of the manufacturers; (3) the sending of a monthly sealed letter; (4) establishment by the Mississippi Valley Lumberman of its publicity department, but not claiming that this was an activity of the association; (5) the plan of using the Scout as a medium of conveying to the membership of the association information regarding sales to mail-order houses and to others not regular retail dealers.

This use of the Scout was discontinued after a trial of one year.

In May, 1908, a conference between certain representatives of the various branches of the lumber trade was held at Tacoma. The Northwestern Lumbermen's Association was represented and a call was issued for a subsequent national conference to be held at Minneapolis in June, 1908, immediately following the convention of the National Lumber Manufacturers' Association. This lumber trade congress was held and delegates from 30 lumber associations were present, including those from the Northwestern Lumbermen's Association. At this congress a code of ethics was adopted, which was thereafter also adopted by said North-

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western Lumbermen's Association. Among the articles in the new code of ethics appeared the following:

"It should be the duty of the manufacturer and wholesaler to take an active interest in the marketing of their products through regular channels only.

* * * * * * *

"It is the sense of the conference that the widest trade publicity be given for the purpose of making known irresponsible, irregular, and unscrupulous dealers and manufacturers."

This last provision was changed in 1909 by substituting the word "unethical" in place of the word "irregular."

This code of ethics continued in force without material change at the time of the commencement of the present suit.

The evidence also shows that during this period the secretary of the Northwestern Lumbermen's Association from time to time furnished information and advice to the lumber credit agencies in reference to the classification, not only of members of the association itself, but of other dealers as to whether they should be classified as coöperative yards, retail dealers, consumers, or otherwise.

It is to be borne in mind in this connection that the lumber credit agencies lists were in constant use by wholesalers and manufacturers.

The issuance of an official bulletin or official report by the Lumber Secretaries' Bureau of Information continued during the years 1907 and 1908. The method of its compilation and use was as follows: A retail lumber dealer learning of a sale by a wholesaler to a consumer would make complaint in writing to the secretary of the association to which the retailer belonged. The secretary would thereupon take the matter up, ascertain the facts in regard to the matter complained of, and submit his report to the board of directors of the Lumber Secretaries' Bureau of Information. This body determined whether the matter should be reported in the next issue of the Bulletin and instructed the secretary accordingly. The Bulletin when issued was distributed among the members of the several associations. It should be noted in connection with this matter of the Bulletin, however, that the secretary of the Northwestern Lumbermen's Association resigned from the Lumber Secretaries' Bureau of

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Information in the spring of 1906, and did not again become a member of said bureau until 1909.

Among the activities of the Northwestern Lumbermen's Association during the period subsequent to 1907 was the use of "Customers' Lists." This was a plan apparently originating with the secretary of this association, and suggested by him to the secretaries of other similar associations through the secretaries' bureau, and adopted by other secretaries to a greater or less extent. Briefly the plan was this: The secretary of the association at the beginning of each year would send a circular letter to the members of the association asking for a list of wholesalers or manufacturers with whom the retailer dealt, and in reference to whom he desired to be kept informed. Upon receiving such lists, the information was rearranged and compiled upon a card index, so as to show the customers of the various manufacturers and wholesalers in the territory covered by the association, and by exchange of lists the information upon this card index would be extended so as to cover the territory of other associations. Information was then obtained by the secretary of the association as to irregular or unethical shipments by such wholesalers or manufacturers. The two principal sources of such information to the secretary were communications from the members of the association as to irregular or unethical sales which came to their notice in their vicinity, and reports by detectives hired by the association from time to time to make investigation and report to the secretary. The defendant Boyce was largely employed in this work.

Upon the receipt of such information the secretary would notify customers of the offending wholesaler or manufacturer in regard to the specific unethical or irregular sale.

Whether such notice by the secretary should be sent to a few or to many of the customers of the offending wholesaler or manufacturer rested in the discretion of the secretary. In one extreme instance it was sent to 1,200 customers. The customers receiving such information would then take up the matter with the offending wholesaler or manufacturer, protesting against such unethical or irregular shipments.

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There is no dispute as to the existence and operation of this method, but it is denied by defendants that it was carried out in pursuance of any conspiracy or agreement. It is further strenuously urged that the various members of the association receiving notices from the secretary of unethical or irregular sales by any particular wholesaler or manufacturer, were under no obligation or agreement to take any action whatsoever, but the evidence is conclusive that action was taken by the individual members upon receiving the information. In the earlier years of the use of customers' lists the secretary of the association would himself write directly to the offending wholesaler or manufacturer. This plan was later changed for the one above outlined. The change in method was made for two reasons, according to the testimony of the secretary. First, on account of a decision of the Supreme Court of the State of Nebraska in the case of *State* v. *Adams Lumber Co.*, 116 N. W., 302; secondly, because many of the manufacturers resented receiving such communications from the secretary.

A careful consideration of the evidence has convinced me that these two activities, the use of the bulletin and the use of the customers' lists, are not substantially different from the use of the "Official Report" under consideration in the case of *Eastern States Lumber Association* v. *United States*, 234 U. S., 600.

The court in that case said:

"The circulation of these reports not only tends to directly restrain the freedom of commerce by preventing the listed dealers from entering into competition with retailers, as was held by the district court, but it directly tends to prevent other retailers who have no personal grievance against him and with whom he might trade from so doing, they being deterred solely because of the influence of the report circulated among the members of the association."

While, as above noted, the secretary of the association mentions, among other methods used to effect desired ends, the establishment of the "publicity department" in the Mississippi Valley Lumberman "in which Mr. Walker undertook to give fair notice to all the trade of the operations of various pirates and buccaneers in the lumber business," he does not claim that this effort was under the authority or

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by the direction of the association; nor does the evidence warrant a conclusion that the "publicity department" of the Mississippi Valley Lumberman was under the management or control of the association. It is admitted in the answer, however, that during said period the secretary did from time to time furnish to the Mississippi Valley Lumberman various items of information showing shipments of lumber and lumber products from manufacturers and wholesalers direct to consumers. Also it is admitted that both the secretary and the Defendant Walker knew and intended that such items should be published in said paper and circulated therein as items of interest to the subscribers of said paper. But it is denied that this was done in furtherance of any conspiracy or combination.

During a portion of this period there appeared in the Mississippi Valley Lumberman in the "publicity department" the standing announcement:

> "Selfish dealers. That the trade can have an opportunity to become thoroughly familiar with the names of the retail lumbermen who buy from manufacturers who are known to be supplying catalogue houses with material, we reproduce the list once more."

Followed by a list of dealers.

Also the following announcement:

> "We again reproduce the list of those who have signed the affidavit certifying that they do not sell to catalogue houses nor solicit trade of the consumers in the territory of the legitimate dealers."

The evidence is convincing that the defendant Walker during this period was zealous in his efforts to carry out the same aims as the association in respect to the lumber trade; that he received from time to time from the secretary of the association information which had been collected by the use of the customers' lists; and that such information was used in the columns of his paper. The fact that he independently gathered other information is not material here.

It is claimed by counsel for defendants that there is nothing in the record indicating that the use of customers' lists interfered in the slightest way with the channels of interstate commerce. This claim in my judgement is not sustained by the record. The purpose and effect of the use of

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the customers' lists were to coerce wholesalers and manufacturers to refrain from selling direct to consumers. The evidence of the secretaries themselves is quite persuasive. The secretary of one of the associations writes to the secretary of defendant association:

"I have sent little or nothing to the Scout for a good many months for, like yourself, I feel that the customers' lists is by all odds the most effective—at least we have always found it so."

The secretary of defendant association replies:

"Noting what you say about the effectiveness of the use of the customers' list, I want to say that I quite agree with you that it is by far the best method which has ever been applied."

Again a secretary of one of the allied associations writes:

"We have perfected a customers' list now for the last three years at the beginning of the year and have used it very effectively whenever it was necessary. I am of the opinion that no better results can be obtained than for the Northwestern, Southwestern, Western, and possibly the Illinois Association to fully perfect a customers' list so that we can exchange information from time to time. Others will fall in line as time goes on, and I think the very best results will then be accomplished in a quiet and effective way."

The secretary of the Northwestern Lumbermen's Association testified in reference to this matter as follows:

"Q. At the time that this customers' list—you were using it in 1908 and 1909 and 1910—when a manufacturer who had been shipping to the consuming trade paid no attention to the letter of the retailer, did you do anything further in the matter?—A. I don't recall a single case where a manufacturer did not pay some attention to it.

"Q. What do you mean by paying some attention to it?—A. Well, he answered the letter and either explained it in a satisfactory way to this dealer, in a way which satisfied the dealer who had made the complaint, or he indicated that it was a mistaken step on his part and he intended not to do it again and would not do it again, and that was the end of it."

But this is not all. A mass of evidence in the record bears out these statements of the secretaries. The testimony and admissions of manufacturers and wholesalers, of persons connected with mail-order houses, of retail dealers, and of consumers show that these efforts of the defendants were successful to a very considerable degree in restraining such interstate commerce as was considered unethical or irregu-

lar, and in restricting interstate commerce to so-called regular channels—that is, from wholesalers and manufacturers to the retailer, and from the retailer to the consumer.

It is true that many of these witnesses, as well as others, testified that notwithstanding the efforts of the defendants they were able to provide themselves with such lumber as they needed, and it is claimed on the part of counsel for defendants that this being the case the restraint of interstate commerce, if any, by reason of the methods of the defendants, was merely negligible. In my judgment, this contention is not sound. The test is not whether by alleged methods carried out in pursuance of a conspiracy some portion of interstate commerce is annihilated, but whether such commerce is substantially interfered with or restrained.

The responsibility of those who unlawfully place substantial obstacles in the legitimate channels of interstate commerce is not lessened by the fact that some of the persons engaged in such commerce are able by superior agility to surmount the obstacles and that others by strength are able to break them down.

The court will not feel itself compelled to adjudicate in mathematical terms the extent of the restraint of interstate commerce if the evidence shows that it is substantial.

Nor is it material here that the motives of the defendants in carrying out the activities above described were of the best, and that the acts were inspired by an honest belief that the interests not only of those engaged in the lumber trade, but of the community at large, would be best served by having lumber and lumber products distributed solely through so-called regular channels. Such matters might very properly be considered by Congress in determining the propriety of enacting proposed legislation. The sole inquiry here before the court at this time, however, is whether the facts disclosed by the record make out a case within the statute already enacted.

In *Eastern States Lumber Association* v. *United States*, the court uses the following language:

"The argument that the course pursued is necessary to the protection of the retail trade and promotive of the public welfare in providing retail facilities is answered by the fact that Congress, with

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the right to control the field of interstate commerce, has so legislated as to prevent resort to practices which unduly restrain competition or unduly obstruct the free flow of such commerce, and private choice of means must yield to the national authority thus exerted. *Addyston Pipe Co.* v. *United States*, 175 U. S., 211, 241–242."

In my judgment, the Government has clearly made out a case within the statute, as interpreted in *Eastern States Lumber Association* v. *United States*, 234 U. S., 600; *Lawler* v. *Loewe*, 235 U. S., 522, and is entitled to relief by way of injunction.

It is proper to add that the defendants have, each of them, activities other than those above criticized, of wide range and considerable importance, in reference to which no complaint is made.

The injunction should therefore be against the several defendants, but directed specifically toward the illegal activities heretofore and at the time of the filing of the bill carried on by them in interference with and restraint of interstate commerce, to wit: The use of customers' lists in collecting, compiling, and distributing information whether to the members of the association, to trade publications or other newspapers, to credit agencies, or to the public at large, as to sales by wholesalers and manufacturers direct to consumers, including mail-order houses and coöperative yards.

Decree may be prepared accordingly.

FREY & SON, INC., v. CUDAHY PACKING CO.[a]

(District Court, D. Maryland. June 21, 1917.)

[243 Fed. Rep., 205.]

DAMAGES 225—RECOVERY—AMOUNT.—In an action for damages for tortious injury, where plaintiff proved a loss of profits it would have made on resale of a commodity, had it been able to buy such commodity at the price other jobbers could obtain it from defendant, plaintiff can only recover for those damages suffered before the date of the filing of the suit, and is not entitled to recover those suffered between that time and verdict.[b]

[Ed. Note.—For other cases, see Damages, Cent. Dig., §567.]

[a] For opinion on motion to quash service (228 Fed. 209), see *ante*, p. 875. On demurrer to bill (232 Fed. 640), see *ante*, p. 883. For charge to jury on trial of case, see *ante*, p. 876.

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At law. Action by Frey & Son, Inc., against the Cudahy Packing Co., a corporation. On objection to the entry of judgment on so much of the verdict as ascertained the damages suffered by plaintiff subsequent to the date of the filing of suit. Judgment entered upon balance of verdict.

See also (D. C.) 228 Fed., 209; (D. C.) 232 Fed., 640.

Daniel W. Baker, of Washington, D. C., and *Horace T. Smith*, of Baltimore, Md., for plaintiff.

Gilbert H. Montague, of New York City, and *Washington Bowie, jr.*, of Baltimore, Md., for defendant.

ROSE, District Judge. The defendant objects to the entering of the judgment upon so much of the verdict of the jury in this case as ascertained the damages suffered by plaintiff subsequent to the date of the filing of the suit. In the nature of things there is no reason why a jury should not be allowed to ascertain and award the damages suffered by plaintiff down to the time of trial from wrongful acts of the same nature as those mentioned in the declaration. If such were the law, there would doubtless sometimes be difficulty in applying it; but, on the whole, much trouble and expense would be saved.

The general rule is to the contrary; perhaps because when it was first formulated the judges were interested in the fees paid to the chancery for the writs, and they did not care to furnish for the price of one the justice that, from their point of view, should be paid for by the suing out of two or more. However this may be, it has long been established that the plaintiff can recover only for such damages as were the consequences of what the defendant did before suit was brought, although it is immaterial whether the effect of what was done showed itself before or after the bringing of the suit, as, for example, where the thing complained of is a tortious injury to the person or property from some particular act, the plaintiff may recover for any damage which manifests itself up to the time of the verdict. On the other hand, where the injury sued for is caused by a mere repetition or continuation of acts of the same class as that for which the suit was brought, the plaintiff's recovery is limited to the damages resulting from such of those acts as were done before the bringing of the suit. In *Lawlor* v. *Loewe*, 235 U. S.,

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536, 35 Sup. Ct., 170, 59 L. Ed., 341, the plaintiff was allowed to recover for the damage done to it by a secon[206]dary boycott instigated by the defendant before the bringing of the suit, although some of the injury did not manifest itself until afterwards; but the authorities cited by the Supreme Court in support of its conclusion do not justify the assumption that it intended to modify the previously recognized principles of law.

In this case the only damage proved by the plaintiff was the loss of profits it would have made on resales of Old Dutch Cleanser, if it had been able to buy Old Dutch Cleanser at the price at which other jobbers could obtain it. Such damage is a damage which occurs from day to day, and the damage on one day is not the necessary result of an act done by the defendant at an earlier date. The difference between cases in which the jury can give damages down to the date of the verdict and those in which it can not may be illustrated thus: If the defendant had made some false and libelous statement against the plaintiff which acquired general circulation, the damage from that false and libelous statement might well have continued long after the bringing of the suit, and long after defendant ceased to be in business at all. On the other hand, if the defendant in the case at bar had wound up its affairs the day after the suit was brought, no one would contend that plaintiff was entitled to recover damages caused by the refusal of defendant to sell its goods after that date, or to permit other persons so to do, because both the motive and the power to enforce such refusal or restraint ceased with the defendant's going out of business.

I wish the law were otherwise, but, as it is, I shall be compelled to set aside so much of the verdict as awards the plaintiff damages from the time of the institution of the suit to the verdict. Judgment in plaintiff's favor will be entered upon the balance of the verdict.

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SAMPLINER v. MOTION PICTURE PATENTS CO. ET AL.

(District Court, S. D. New York. June 4, 1917.)

[243 Fed. Rep., 277.]

CHAMPERTY AND MAINTENANCE 5(6)—PURCHASE OF CLAIMS FOR DAMAGES BY ATTORNEYS.—While a claim for treble damages by a person injured by a violation of the Sherman Anti-Trust law (act July 2, 1890, c. 647, 26 Stat., 209) is assignable, where a lawyer, for services that he was willing to settle for $5,000 cash, took an assignment of a claim which he thought was worth at least $75,000, the transaction was champertous, and he could maintain no action on the assigned claim, as it was taken for purposes of speculation.*

[Ed. Note.—For other cases, see Champerty and Maintenance, Cent. Dig., §§ 36–44.]

[278] Action by Joseph Sampliner against the Motion Picture Patents Co. and others. On motion for a directed verdict. Motion granted.

Plaintiff claimed to be the assignee of the Lake Shore Film & Supply Co., of Cleveland, Ohio, against defendants for triple damages under the Sherman Anti-Trust Act. The defendants set up the defense of champerty, and that issue was tried separately under the provisions of Code N. Y., section 973, before judge and jury.

Rogers & Rogers, *Gustavus A. Rogers*, and *Saul E. Rogers*, all of New York City, for plaintiff.

Charles F. Kingsley, of New York City, for defendants Motion Picture Patents Co., Jeremiah J. Kennedy, and Harry N. Marvin.

Coudert Bros., *Samuel Seabury*, and *Charles B. Samuels*, all of New York City, for defendants Pathé Frères and Jacques A. Berst.

Robert H. McCarter, of Newark, N. J., and *George F. Scull*, of New York City, for defendants Thomas A. Edison (Inc.), Frank L. Dyer, and William Pelzer.

R. O. Moon, of Philadelphia, Pa., for defendant Kalem Co.

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Dwight Macdonald, of New York City, for defendant Percival Waters.

Samuel O. Edmonds and *Samuel Seabury*, both of New York City, for defendants Albert E. Smith and Vitagraph Co. of America.

MAYER, District Judge. Both sides having moved for a direction of a verdict, I find as a fact that the plaintiff purchased this cause of action with intent to sue thereon. I find, as a fact, also, that the so-called assignment, Plaintiff's Exhibit No. 1, was executed by the Lake Shore Co., through its officers, pursuant to action at a special meeting of the board of directors. Having thus disposed of the facts, I proceed to express briefly my views of the law of the case.

The Sherman Anti-Trust law was enacted by Congress with the fundamental purpose of redressing what Congress regarded as grievous wrongs visited upon persons by those combinations or monopolies which the statute denounced. It provided, broadly speaking, two kinds of remedies: One was a suit in equity at the instance of the Government to dissolve unlawful combinations, and in that manner to destroy conspiracies directed against what Congress regarded as the appropriate conduct of the business of this country. The other remedy which was afforded was to give to the person injured in his business or his property an opportunity to recover damages for injury to his business or his property, and Congress provided that, whatever the damage was which the jury might find, that damage should be trebled—the theory being that the injured person should be recompensed in a manner so exemplary that it would be a lesson to others.

Now, the courts have held that that provision does not provide for a penalty, but must be regarded as in the nature of damage compensation. It certainly never could have been the intent of Congress that so important a remedy, having to do with the appropriate con[279]duct of the business of the country, should be the subject-matter of bargain, sale, and speculation at the hands of attorneys. Judge Hough has held, and I am bound to follow his holding, in the Imperial Film Case, 244 Fed. 985, that such a cause of action is

assignable. I must therefore start off with the assumption that, as a matter of law, the cause of action could be assigned, and it is probably true that, if the courts thus hold, it will be because they feel that in a proper case a merchant who, or a corporation which, has been injured, may so avail of the cause of action as to be serviceable to creditors, or perhaps to other persons. But I have a strong conviction that it never will be held in a Federal court, either in a court of original jurisdiction or an appellate court, that such a cause of action is merchandise, to be availed of by an attorney.

I personally, and every gentleman in this case on both sides, have a very deep regard for the profession to which we belong. It is a profession which insists that its purposes are noble and its practices are useful. It is the duty of the lawyer to render services, to advise, to assist, and aid those whose life or liberty or property is in one manner or another in peril. But the moment a lawyer steps down from that high place to be a speculator in law-suits, he is absolutely violating every tradition of the profession, and the courts have persistently frowned on that sort of thing. The case is entirely different from one where a lawyer, for services rendered, takes an assignment of some thing in action clearly and unquestionably to recompense himself for such service.

Now, what is this case? In this case a lawyer, for services that he was willing to settle for $5,000 cash, takes an assignment of a claim which he himself thought was worth at least $75,000, and which, trebled, makes over $200,000. He then proceeds, later to bring a law-suit in which he makes these damages $101,000, which, trebled, means $303,000, and then he comes into this jurisdiction with a claim of $250,000, which, trebled, makes $750,000. If that is not the rankest kind of speculation, I never heard of a case in my life that involved speculation. More than that, little things in a law-suit are of great service, and, in response to Mr. McCarter's final cross-examination, I noted that the plaintiff said, "The time I bought the claim"—that is unquestionably what he did; if he could get a settlement, well and good; if he could not get a settlement, then he could speculate upon what damages he could obtain.

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Now, these defendants, if they were guilty of wrongs, could have responded in a lawsuit to the true plaintiff. This plaintiff's attorney would have had the right to say, "I will take this lawsuit for you on a contingency, dependent on recovery;" and if he had done that he would not have violated the law in any respect, as I understand it. But he was ready to take this claim, and pay money out of his own pocket, which is champertous in itself, for the disbursements necessary to prosecute this lawsuit to an end.

Now, both sides have presented many authorities. I think the case is not one which requires much citation of authority, and I shall content myself with quoting, as part of my opinion that I am now [280] delivering orally upon this record, the significant words of Chancellor Kent, in a case where perhaps the facts were a little different, but where the principles were stated with the clarity and the firmness that characterized his judicial career. He put the matter in language that any man may understand, and he said:

> "The purchase was avowedly made as a matter of speculation, and at a time when this attorney knew, from previous disclosures made to him in his character of attorney, all the facts on which the foundation of the claim so purchased rested, and which created a belief in his mind that the value of the wine could be recovered. Such a purchase, by such an officer, and under such circumstances, can not be sustained. It is champerty, for the unlawful maintenance of a suit, and the contract was therefore unlawful, as well by common law, as by the statute."

And he continued, and I am quoting from *Arden* v. *Patterson*, 5 Johns. Ch. (N. Y.) 44:

> "The purchase of a lawsuit by an attorney, in a case like this, is champerty in its most odious form; and it ought equally to be condemned on principles of public policy. It would lead to fraud, oppression, and corruption. As a sworn minister of the courts of justice, the attorney ought not to be permitted to avail himself of the knowledge he acquires in his professional character to speculate in lawsuits. The precedent would tend to corrupt the profession, and produce lasting mischief to the community."

Adopting those clear and unquestioned statements as the doctrine to which every lawyer and judge who loves his profession must subscribe, I grant the motion and direct a verdict for the defendants.

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UNITED STATES v. COWELL ET AL.

(District Court, D. Oregon. July 16, 1917.)

[243 Fed. Rep., 730.]

MONOPOLIES 31—CRIMINAL PROSECUTIONS—INDICTMENT.—An indictment for combining and engaging in a monopoly in restraint of interstate trade and commerce need not set out any overt act, as the combination or contract in any form in restraint of trade constitutes the offense under the statute, and it is only essential to charge the combination or contract.[a]

INDICTMENT AND INFORMATION 87(6)—MONOPOLIES—TIME OF COMMISSION OF OFFENSE.—An indictment for combining and engaging in a monopoly in restraint of interstate commerce sufficiently alleges the time of the offense by alleging that the parties were engaged in the unlawful combination or contract between specified dates, as the offense is a continuing one and the parties are transgressing the statute while engaged in the operation of the design or in carrying it into effect.

MONOPOLIES 29—CRIMINAL OFFENSES.—All contracts or acts which are theoretically attempts to monopolize, and which in practice have come to be considered as in restraint of trade in a broad sense, are an offense under the statute against monopolies; but contracts not unduly restraining commerce are not prohibited, the standard of reason being the measure used for the purpose of determining whether the particular act is prohibited by the statute.

INDICTMENT AND INFORMATION 110(20)—LANGUAGE OF STATUTE—MONOPOLIES.—An indictment for combining and engaging in a monopoly in restraint of interstate trade and commerce must give particulars, and not rely simply on the words of the statute.

MONOPOLIES 31—PROSECUTIONS—INDICTMENT.—An indictment alleged that various corporations or companies located in northern and southern California, Oregon, and Washington were manufacturing cement for the general trade and engaged in interstate commerce; that they were represented by certain officers and managers, who promoted and carried on the business; that such officers and managers knowingly, by concerted action, carried on the business of such concerns without competition as to the price of their cement, and by the same concerted action prevented the southern California company from selling or consigning cement for sale in Washington or Oregon, the northern California companies from selling or consigning for sale in Washington, the Washington company from doing the same in Oregon or California, and the Oregon company as to Washington and California, and had prevented the northern California and Oregon companies

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from selling in Oregon otherwise than upon arbitrary and non-competitive prices fixed and agreed upon in advance; and that by reason thereof consumers had been compelled to pay arbitrary prices greatly in excess of the price at which they would have secured such cement but for the combination. *Held*, That the indictment was sufficient, as it would enable defendants to prepare their defense and to defeat any subsequent prosecution for the same offense, and enable the court to determine that a combination existed, that defendants were engaged therein, and that the restraint of trade was undue or unreasonable.

INDICTMENT AND INFORMATION 87(2)—ALLEGATIONS AS TO VENUE.—The objection that no venue was laid in such indictment was without merit.

[731] S. H. Cowell and others were indicted for offenses. On demurrer to the indictment. Demurrer overruled.

Clarence L. Reames, United States attorney, and *Barnett H. Goldstein*, Assistant United States attorney, both of Portland, Oreg., for the United States.

Frederick Bausman, of Seattle, Wash., and *Veazie, McCourt & Veazie*, of Portland, Oreg., for defendants Eden, Sutherland, Coats, Baillie, and W. P. Cameron.

Teal, Minor & Winfree, of Portland, Oreg., for defendants Butchart and Moore.

WOLVERTON, District Judge. The indictment herein charges that the defendants, during the period between August 1, 1914, and the finding of the indictment, knowingly and unlawfully engaged in a combination in restraint of trade and commerce among the several States, and by a second count that during the same time they engaged in a monopoly in like restraint of trade. The defendants are officers in some capacity, in control to a greater or less extent, of certain corporations and companies engaged in the manufacture of cement, and in the traffic and sale of the products in States other than where manufactured, as well as in their own States. The companies are classified as the Northern California companies, the Southern California company, the Washington companies, and the Oregon company.

A demurrer has been interposed to the indictment, by which three questions are presented, namely: That defendants are not advised of the time, place, or circumstances

upon which the Government relies for conviction; that the offense with which it is sought to charge the defendants is not so stated as to afford them, after conviction or acquittal, protection against a second indictment for the same offense; and that the court is not able to determine from the indictment whether a combination existed, or any of the defendants engaged therein, or whether the restraint referred to was undue or unreasonable.

[1] First, as it relates to the time charged as to when the offense was committed: The parties were engaged from August 1, 1914, until the finding of the indictment, and by nature the act was continuing in its operation. In a case under this statute, it is necessary to set out any overt act. Simply the combination or contract in any form in restraint of trade between the States or with foreign nations constitutes the offense, and it is only essential to charge the combination or contract. *Nash* v. *United States*, 229 U. S. 373, 33 Sup. Ct. 780, 57 L. Ed. 1232; *United States* v. *Rintelen* (D. C.) 233 Fed. 793.

[2] The combination is not a thing of the instant the minds of the agreeing parties have come to a complete understanding, either express or implied. The purpose thereof is an essential element as well, and this may contemplate that its operation shall extend over a period of time. While the parties are engaged in the operation of the design, or in carrying the same into effect, they are transgressing the statute, they are still agreeing to the unlawful offense, and still cohering in the thing that the law condemns. Thus the offense becomes a continuing one, and it is only necessary to allege that the parties were engaged in the unlawful combination or contract between specified dates. By [732] such allegation the offenders are apprised of the time of their transgression. *United States* v. *MacAndrews & Forbes Co.* (C. C.), 149 Fed., 823.

[3] The next question involves the nature of the offense. This has been settled by the Supreme Court. The statute has been construed to be very broad, and not only this, but very comprehensive. It comprises, says the court in *Standard Oil Co.* v. *United States*, 221 U. S. 1, 59, 31 Sup. Ct. 502,

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515, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912D, 734:

"All contracts or acts which theoretically were attempts to monopolize, yet which in practice had come to be considered as in restraint of trade in a broad sense." And, further, it evinces "the intent not to restrain the right to make and enforce contracts, whether resulting from combination or otherwise, which did not unduly restrain interstate or foreign commerce, but to protect that commerce from being restrained by methods, whether old or new, which would constitute an interference that is an undue restraint." And "it was intended that the standard of reason which had been applied at the common law and in this country in dealing with subjects of the character embraced by the statute, was intended to be the measure used for the purpose of determining whether in a given case a particular act had or had not brought about the wrong against which the statute provided."

[4] There has since been no digression from this holding, and it is unnecessary to cite the succeeding authorities. Of course, I realize and recognize the authority of *United States* v. *Cruikshank et al.*, 92 U. S. 542, 23 L. Ed. 588. It is essential in a case like this to descend to particulars, and not to rely simply on the words of the statute in pleading. *United States* v. *Hess*, 124 U. S. 483, 8 Sup. Ct. 571, 31 L. Ed. 516.

[5] Turning to the indictment, we find various corporations or companies, located in different States, manufacturing Portland cement for the general trade and engaged in interstate commerce. The companies are represented by certain officers and managers, who promote and carry on their business, being the defendants under indictment. These persons have knowingly, by concerted action, carried on the business of the several concerns named, without competition as to prices in the several States in which they are engaged in the manufacture of their cement, and by the same concerted action have prevented the southern California company from selling or consigning for sale in either Washington or Oregon and the northern California companies from selling or consigning for sale in Washington, the Washington companies from doing the same as it respects Oregon and California, and the Oregon company as to Washington and California, and have prevented the northern California and

Oregon companies from selling or consigning for sale in Oregon otherwise than upon arbitrary and non-competitive prices, fixed and agreed upon in advance; and it is further stated that, by reason thereof, consumers have been compelled to pay for such cement arbitrary prices greatly in excess of prices at which they would have secured such cement if it were not for the combination.

This, to my mind, states quite clearly the scheme and purpose of the combination. It descends to particulars, and no one need be misled into preparing his defense for something other than as alleged against him. The court knows what the charge is, without the liability of mis[733]conception or mistake, and the defendants need not fear that another prosecution can follow after trial upon this indictment.

Apply the standard of reason, which counsel insist that we shall, and then inquire further whether there is an undue restraint of trade or commerce. The indictment does allege that, by reason of these things, the defendants were engaged in undue and unreasonable restraint of trade. We may put this to one side as a conclusion. There is sufficient alleged, however, from which to deduce this very conclusion. The concert of action which implies a combination for marketing their cement in particular locations, and the direct agreement between them for fixing arbitrary and non-competitive prices for the sale of cement in Oregon, is sufficient to stamp their demeanor as in restraint of interstate trade and commerce. Such a combination is without the elements or indicia of a wholesome agreement, and can not be so characterized. The following cases are illustrative: *Standard Sanitary Mfg. Co.* v. *United States*, 226 U. S. 20, 33 Sup. Ct. 9, 57 L. Ed. 107; *Eastern States Lumber Ass'n* v. *United States*, 234 U. S. 600, 34 Sup. Ct. 951, 58 L. Ed. 1490, L. R. A. 1915A, 788.

The third objection is answered by the foregoing. The same reasoning applies to the objections to the second count.

[6] The objection that no venue is laid is without merit.

Demurrer overruled.

Syllabus.

FORD MOTOR CO. v. UNION MOTOR SALES CO. ET AL.[a]

(Circuit Court of Appeals, Sixth Circuit. August 1, 1917.)

[244 Fed. Rep. 156.]

MONOPOLIES 17(1)—RESTRAINT ON TRADE—PRICE RESTRICTION—RESALE.—At least subject to limitations, a system of contracts between a manufacturer and retail dealers, whereby it, in connection with absolute sales of its product, attempts to control the resale prices for all sales, by all dealers, is a restraint on trade, invalid both at common law and, so far as it affects interstate commerce, under Sherman Anti-Trust Act, July 2, 1890, c. 647, 26 Stat. 209.[b]

PATENTS 216—SALE OF PATENTED ARTICLES—ABSOLUTE OR CONDITIONAL.—There is an absolute as distinguished from a conditional sale of patented articles by the manufacturer, the dominant character of the dealing being one of sale with attempt to provide and enforce resale price, and title being reserved in the manufacturer only till full purchase price is paid, with right of repossession only in case of default in such payment, manifestly only to enforce payment, and the manufacturer being under no obligation to take back the articles, though the parties are styled manufacturer licensor and dealer licensee, and the contract in terms grants right and license to use and vend the articles within specified territory, the manufacturer agreeing to sell its products to the dealer, and he agreeing to purchase the articles at specified times, and it being provided that he is in no way the legal representative or agent of the manufacturer, and it being stipulated that he shall pay a certain amount as agreed damages for each failure to observe the agreement to maintain resale prices.

PATENTS 216—RIGHTS OF PATENTEE—DICTATING RESALE PRICES.—A patent gives the patentee no right to dictate price at which patented articles absolutely sold by him shall be resold by the purchaser, and so no right to restrain sale at less than the price attempted to be fixed by the patentee by a third person buying from the purchaser from the patentee at less than such price, with knowledge of the contract between the patentee and such purchaser attempting to fix the resale price.

Appeal from the District Court of the United States for the Southern District of Ohio; Howard C. Hollister, judge.

Suit by the Ford Motor Company against the Union

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[a] For opinion of the District Court (225 Fed. 373) see *ante*, p. 182.

Opinion of the Court.

Motor Sales Company and others. From a decree dismissing bill (225 Fed. 373), plaintiff appeals. Affirmed.

Alfred Lucking, of Detroit, Mich., for appellant.

Hon. Judson Harmon, of Cincinnati, Ohio, for appellees.

Before KNAPPEN, MACK, and DENISON, circuit judges.

KNAPPEN, Circuit Judge. Plaintiff is a manufacturer, seller, and distributor of automobiles, important and essential parts of which are patented. It marketed its product under a so-called "license system," by which dealers purchased the automobiles and were given definite and restricted territory, and in turn agreed to resell only at plaintiff's full list prices. Ford automobiles could thus be obtained at no less price except by inducing Ford dealers to break their agreement with plaintiff. Defendants obtained Ford machines from a dealer or dealers, and sold them and advertised to sell them at less than plaintiff's regular price list. Plaintiff filed its bill to restrain this interference with its [157] business. Upon final hearing on pleadings and proofs the bill was dismissed. (D. C.) 225 Fed. 373. The appeal from the decree of dismissal. The ultimate questions concern the validity and enforceability of the price-restricting agreement involved.

[1] At least subject to certain limitations hereafter stated, it is the general and well-settled rule that a system of contracts between a manufacturer and retail dealers by which the manufacturer, in connection with absolute sales of his product, attempts to control the resale prices for all sales, by all dealers, eliminating all competition, and fixing the amount which the ultimate purchaser shall pay, amounts to restraint of trade, and is invalid both at common law and, so far as it affects interstate commerce, under the Sherman Anti-Trust Act (*Dr. Miles Medical Co.* v. *Park & Sons Co.*, 220 U. S. 373, 400, 31 Sup. Ct. 376, 55 L. Ed. 502; *John D. Park & Sons Co.* v. *Hartman* [C. C. A. 6] 153 Fed. 24, 82 C. C. A. 158, 12 L. R. A. [N. S.] 135; *Bauer* v. *O'Donnell*, 229 U. S. 1 [*The Sanatogen Case*] 33 Sup. Ct. 616, 57 L. Ed. 1041, 50 L. R. A. [N. S.] 1185, Ann. Cas. 1915A, 150; *United States* v. *Kellogg Toasted Corn Flake Co.* [D. C.] 222 Fed. 725, 728, Ann. Cas. 1916A, 78, decided by three judges of this circuit,

sitting under Expediting act, Feb. 11, 1903, c. 544, 32 Stat. 823 [Comp. St. 1916, §§ 8824, 8825]; *Bobbs-Merrill Co.* v. *Straus*, 210 U. S. 339, 28 Sup. Ct. 722, 52 L. Ed. 1086; *Straus* v. *American Pub. Ass'n*, 231 U. S. 222, 34 Sup. Ct. 84, 58 L. Ed. 192, L. R. A. 1915A, 1099, Ann. Cas. 1915A, 369; *Straus* v. *Victor Talking Machine Co.*, 243 U. S. 490, 37 Sup. Ct. 412, 61 L. Ed. ——; *Motion Picture Co.* v. *Universal Film Co.*, 243 U. S. 502, 37 Sup. Ct. 416, 61 L. Ed. ——), and that, at least as against a purchaser from such dealer, an attempt to enforce a reservation of right to fix the price at which resale shall be had by the vendee is equally futile, notwithstanding the article is patented, provided, as already said, the transfer to the vendee is full and complete (*Bauer* v. *O'Donnell*, supra; *Straus* v. *Victor Co.*, supra).

There can be do doubt that if plaintiff's contracts with its dealers amounted to absolute sales of its automobiles, and if the case otherwise falls within the principles declared in the cases cited, plaintiff was properly denied relief. Plaintiff contends, however, that its case does not fall within the principles stated or the authorities cited; that under its contracts with its dealers a conditional sale only was effected, passing but a qualified or restricted title to the automobiles delivered thereunder; that the restrictions attempted to be imposed by the plaintiff, as patentee, on the purchaser's right to resell are valid, and having been agreed to by the purchaser are binding not only upon him, but upon those purchasing from the dealer with knowledge of the price restriction.

[2] The question of the nature of the contract between plaintiff and its dealers, whether one of absolute or conditional sales of automobiles, lies at the threshold of the controversy. From a consideration of all the terms of the contract, it is clear that it is essentially one of absolute sale. While the contract, which recites plaintiff's ownership of various patents and patent applications, styles plaintiff the "manufacturer licensor" and the purchaser the "dealer licensee," and in [158] terms grants the "full right and license to use and vend" within the licensed territory automobiles and parts of plaintiff's manufacture, the dominant character

of the dealing is plainly one of sale, with attempt to provide and enforce resale price and territorial restrictions. For example: Plaintiff agrees to "sell its product to the dealer licensee" at certain discounts from list prices, and to allow certain additional rebates scaled on the "net amount of business" done, which plainly means the amount of the dealer's purchases from plaintiff; the dealer agrees to take deliveries and to "purchase the said Ford automobiles" in various months specified. The title to the articles sold is reserved in plaintiff only until the full purchase price is paid, with right of repossession only in case of default in such payment. The provision manifestly is designed only to enforce payment. Plaintiff is under no obligations to take back any of the goods purchased by the dealer, and it is expressly stated that the "dealer licensee is in no way the legal representative or agent of the manufacturer licensor." For each failure to observe the agreement to maintain resale prices, the dealer agrees to pay $250 as "agreed damages the manufacturer licensor will sustain," and is made subject to forfeiture of his contract at plaintiff's option. The other provisions of the contract are not sufficiently controlling or important to require mention.

Courts will look to the dominant intention of the parties, and in this view the case is one of absolute, as distinguished from conditional, sale, not only within our decisions generally (*Mishawaka Woolen Mfg. Co.* v. *Westveer*, 191 Fed., 465; 112 C. C. A., 109; *John Deere Plow Co.* v. *Mowry*, 222 Fed. 1, 137 C. C. A. 539; *In re Stoughton Wagon Co.*, 231 Fed. 676, 145 C. C. A. 562; *Wood Mowing, etc., Machine Co.* v. *Croll*, 231 Fed. 679, 145 C. C. A. 565), but within the applicable decisions of the Supreme Court in the Miles, Sanatogen, and Victor Cases, supra. As expressed in the *Sanatogen Case* (229 U. S., 16; 33 Sup. Ct., 619; 57 L. Ed., 1041; 50 L. R. A. [N. S.], 1185, Ann. Cas., 1915A, 150):

> The title transferred was full and complete with an attempt to reserve the right to fix the price at which subsequent sales could be made. * * * There was no transfer of a limited right to use this invention, and to call the sale a license to use is a mere play upon words.

Opinion of the Court.

See in this connection the *Victor Case*, *supra*, 243 U. S., at pages 497–501; 37 Sup. Ct., 412, 61 L. Ed. —.

[3] Turning, then, to a consideration of plaintiff's rights as patentee: Its counsel states the broad proposition that "this is a case of patented articles, and it is absolutely lawful to create a monopoly in patented articles." In support of this proposition, counsel cite the statement in *Bement* v. *National Harrow Co.*, 186 U. S., 70, 91; 22 Sup. Ct., 747, 755 (46 L. Ed., 1058), that "the fact that the conditions in the contracts keep up the monopoly or fix prices [in patented articles] does not render them illegal," and the proposition in the *Creamery Package Case*, 227 U. S. 8, 32, 33 Sup. Ct. 202, 57 L. Ed. 393, to the effect that the owner of a patent has exclusive rights of making, using, and selling, which he may keep or transfer, in whole or in part. Neither of [159]these cases lends support to the contention that the patent grant confers upon the patentee the right to dictate the price at which patented articles absolutely sold by him shall be resold by his purchaser. In the *Bobbs-Merrill Case*, *supra*, which involved the right of an owner of a copyright to restrict the price on resale, it was said (210 U. S. 345, 28 Sup. Ct. 724, 52 L. Ed. 1086) of the *Bement Case* that:

> It was "between the owners of the letters patent as licensor and licensees, seeking to enforce a contract as to the price and terms on which the patented article might be dealt with by the licensee. The case did not involve facts such as in the case now before us and concerned a contract of license sued upon in the State court, and, of course, does not dispose of the questions to be decided in this case."

The Creamery Package Case merely held, so far as material here, that a contract by which the manufacturer of a patented article appointed another and distinct manufacturer, selling like articles, his exclusive agent for the output of the factory does not violate the Sherman Act. Manifestly, neither of these decisions relates in any way to restrictions upon the right of resale of patented articles purchased absolutely. Not only has the Supreme Court not held that the right given by the patent law extends to a control of the price at which articles absolutely sold by the manufacturer patentee could be resold by his vendee, but that court has repeatedly held the contrary.

Opinion of the Court.

In the *Sanatogen Case, supra,* where it was held that an attempt to reserve the right to fix the price at which a patented article fully and completely transferred should be resold by the vendee is futile under the statute, it was said (229 U. S. 10, 33 Sup. Ct. 617, 57 L. Ed. 1041, 50 L. R. A. [N. S.] 1185, Ann. Cas. 1915A, 150):

"The right to make, use, and sell an invented article is not derived from the patent law."

And again (229 U. S. 17, 33 Sup. Ct. 620, 57 L. Ed. 1041, 50 L. R. A. [N. S.] 1185, Ann. Cas. 1915A, 150):

"The right to vend conferred by the patent law has been exercised, and the added restriction is beyond the protection and purpose of the act."

This proposition was recognized and applied in the *Victor Case, supra;* and see by analogy the *Universal Film Case, supra,* 243 U. S. at page 513, 37 Sup. Ct. 416, 61 L. Ed. ——.

Henry v. *Dick,* 224 U. S. 1, 32 Sup. Ct. 364, 56 L. Ed. 645, Ann. Cas. 1913D, 880, lends no support to the plaintiff's propositions. In that case contributory infringement was found in the direct sale (to the purchaser of a patented mimeograph) of a kind of ink suitable for use with the machine, with knowledge by the seller of a license restriction that the mimeograph be used only with ink made by the vendor, and with the expectation that the ink sold would be used with the machine. In the *Sanatogen Case, supra,* the *Dick Case* was distinguished by the consideration that in that case merely a qualified title passed to the purchaser, while in the *Sanatogen Case* the absolute title passed; and in the recent *Universal Film Case, supra,* 243 U. S. 518, 37 Sup. Ct. 416, 61 L. Ed. — the *Dick Case* was distinctly overruled.[160]Counsel cite several cases thought to be inconsistent with the views we have thus far expressed. Many of these cases were referred to in the *Kellogg Case, supra.* But it seems enough to say that we find in none of them anything opposed to the propositions we have stated, except so far as such cases are in conflict with the decisions of the Supreme Court, notably in the *Sanatogen, Victor,* and *Universal Film Cases, supra.* We find nothing in either the Clayton Act (act Oct. 15, 1914, c. 323, 38 Stat. 730) or the

Opinion of the Court.

Federal Trade Commission act (act Sept. 26, 1914, c. 311, 38 Stat. 717 [Comp. St. 1916, §§ 8836a–8836k]) validating price restrictions by a vendor on resale of property sold absolutely by him.

But counsel contends, and with especial emphasis, that the decisions of the Supreme Court in both the *Bobbs-Merrill* and *Sanatogen Cases* were grounded "solely upon the principle that the owner of a patent or copyright can not qualify the title passed by means of a *mere notice attached to the chattel*, so as to restrict third persons in the sale of such articles"; and it is argued that the instant case is distinguished from the cases mentioned by the existence of express contract between the manufacturer-patentee and the dealer. It is true that in the *Bobbs-Merrill Case* (which involved a copyrighted book) the wholesale dealers from whom defendants purchased copies of the book were under no agreement to enforce the terms of the notice by retail dealers, or to restrict their sales to such dealers as would agree to observe the terms stated in the notice, which were that no dealer is licensed to sell at a less price than $1, and that a sale at a less price would be treated as an infringement of the copyright; and there was thus no claim of contract limitation or license agreement controlling the subsequent sales of the book. The holding (210 U. S. 350, 28 Sup. Ct. 726, 52 L. Ed. 1086) was that the copyright statutes "do not create a right to impose, by notice, such as is disclosed in this case, a limitation at which the book shall be sold at retail by future purchasers, *with whom there is no privity of contract.*" In the *Sanatogen Case* it does not appear whether or not the jobber from whom appellee (a retailer) purchased the patented article was under contract relations with the patentee's selling agent not to sell below a given price. Upon the package was a "notice to the retailer" in effect similar to that in the *Bobbs-Merrill Case.* The case was in the Supreme Court on certificate from a Court of Appeals, and the sole question presented was whether the acts of the appellee, in retailing at less than the price fixed in the notice, constituted an infringement of ap-

pellant's patent.* While the ultimate decision was limited to a negative answer to the question propounded by the Court of Appeals, the principles declared in the opinion would equally deny relief in the case of actual contract between the manu[161]facturer and the dealer. It was said (229 U. S. 16, 17, 33 Sup. Ct. 619, 57 L. Ed. 1041, 50 L. R. A. [N. S.] 1185, Ann. Cas. 1915A, 150):

> The packages were sold [by the jobber from whom appellee purchased] with as full and complete title as any article could have when sold in the open market, excepting only the attempt to limit the sale or use when sold for not less than $1. * * * The *right to vend* conferred by the patent law *has been exercised,* and the added restriction *is beyond the protection and purpose of the act.* This being so, the case is brought within that line of cases in which this court from the beginning has held that a patentee who has parted with a patented machine by passing title to a purchaser *has placed the article beyond the limits of the monopoly* secured by the patent act.

And again (quoting with approval from *Adams* v. *Burke*, 17 Wall. 453, 21 L. Ed. 700, 229 U. S. 18, 33 Sup. Ct. 620, 57 L. Ed. 1041, 50 L. R. A. [N. S.] 1185, Ann. Cas. 1915A, 150):

> When the patentee, or the person having his rights, sells a machine or instrument whose sole value is in its use, he receives the consideration for its use and he parts with the right to restrict that use. The article, in the language of the court, passes without the limit of the monopoly. That is to say, the patentee or his assignee having in the act of sale received all the royalty or consideration which he claims for the use of his invention, in that particular machine or instrument, it is open to the use of the purchaser *without further restriction* on account of the monopoly of the patentees.

All italics in quotations from opinions are ours.

We are unable to see any principle upon which the existence of a contract between the manufacturer and his vendee restricting the price on resale can give right of action against the purchaser from his vendee which is denied in

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* It is said in the brief of plaintiff's counsel here that the Waltham Watch Company filed a brief in the Sanatogen Case calling to the court's attention that it had certain litigation pending involving the validity of written contracts, and requested the Supreme Court not to decide "any such question." Manifestly, the only question to be passed upon was that propounded by the certificate of the court below.

the absence of such contract, but in the presence of a warning notice. In each case the purchaser from the manufacturer's vendee has knowledge of the attempted restriction; in neither case is there privity of contract between the manufacturer and the purchaser from his vendee; and this feature of lack of privity is prominent in the decision of the *Bobbs-Merrill Case*, from which we have quoted. Moreover, in the *Victor Case* the reason given (243 U. S. 497, 37 Sup. Ct. 414, 61 L. Ed. ——) for the proposition that "whatever rights the plaintiff has against the defendants must be derived from the 'license notice' attached to each machine" is that "*no contract rights existed between them*, the defendants being only 'members of the unlicensed general public,' and that the sole act of infringement charged against the defendants is that they exceeded the terms of the license notice by obtaining machines from the plaintiff's wholesale or retail agents and by selling them at less than the price fixed by the plaintiff."

But the question we are considering is set at rest by the recent decision in the *Victor Case*, for it there expressly appears (243 U. S. 495, 496, 37 Sup. Ct. 412, 61 L. Ed. ——) that the plaintiff (who was denied relief) had with each of its licensed dealers "a written contract in which all the terms of 'the license notice' are in substance repeated," and that the dealer is authorized to dispose of machines only subject to the conditions expressed in that notice.

The instant case is not distinguished from the otherwise controlling decisions cited by the considerations that here the purchases from the retailers were covert and secret and at less than the restricted prices. While in the *Sanatogen Case* it does not appear whether the[162]price at which defendant purchased was below the restricted price, in the *Victor Case* it was expressly alleged that the dealers were "induced 'covertly and on various pretenses'" to violate their contracts with the plaintiff, and that the sales were at less than the restricted prices.

We see no merit in the contentions earnestly pressed that the plaintiff's price restrictions were incidental only to the

building up of its business and procuring the widest possible stable market, and so were reasonable and proper, as being in the interest of the public, especially in that they tended to secure constant, uniform, and convenient service (including garage and repair service), which could not be had unless dealers are protected against price-cutting competition. The law can not "be evaded by good motives"; it is "its own measure of right and wrong, of what it permits or forbids, and the judgment of the courts can not be set up against it in a supposed accommodation of its policy with the good intention of the parties, and, it may be, of some good results." *Standard Sanitary Mfg. Co.* v. *United States*, 226 U. S. 20, 49, 33 Sup. Ct. 9, 57 L. Ed. 107; *International Harvester Co.* v. *Missouri*, 234 U. S. 199, 34 Sup. Ct. 859, 58 L. Ed. 1276, 52 L. R. A. (N. S.) 525; *Thomsen* v. *Cayser*, 243 U. S. 66, 85, 37 Sup. Ct. 353, 61 L. Ed. ——; *United States* v. *Gt. Lakes Towing Co.* (D. C.) 208 Fed. 733, 744.

The earnestness with which the validity of plaintiff's price restrictions has been pressed upon us has seemed to justify the discussion we have made of recent authorities, reference to which, especially the *Sanatogen*, *Victor*, and *Universal Film Cases* (the two latter were made since plaintiff's original brief was prepared), so far from showing a tendency to "go back to the firm ground of the right of a patentee to absolutely monopolize the vending, as well as the manufacture and use of the patented article," indicates to our minds a constantly progressive tendency in the opposite direction. The *Victor* and *Universal Film Cases*, the latest utterances of the Supreme Court on the questions here involved, have, to say the least, marked no backward step. The invalidity of plaintiff's price restrictions is clearly demonstrated by the decisions we have cited, and no room is thus left for the charge of unfair competition in invading these restrictions.

Of the territorial restrictions we need only say that they can not make valid a price restriction otherwise invalid.

The decree of the District Court dismissing plaintiff's bill is affirmed.

Syllabus.

AMERICAN STEEL CO. v. AMERICAN STEEL & WIRE CO. ET AL.

(District Court, D. Massachusetts. October 17, 1916.)

[244 Fed. Rep., 300.]

MONOPOLIES 28—RIGHT OF ACTION FOR DAMAGES.—Where a company attempted to monopolize the manufacture and sale of coated wire nails, and as part of its plan engaged in various illegal and unfair practices, such as hindering its competitors from obtaining raw materials and the necessary machines, bribing their factory employees to disclose factory conditions and to send out defective goods, and bribing office employes to disclose the names of their customers and their contracts, and then selling to such customers below cost, a competitor attacked in these ways had a right of action for damages, under Sherman Act July 2, 1890, c. 647, 26 Stat. 209 (Comp. St. 1916, §§ 8820–8823), since, while no action lies under that act for unfair practices, damages are recoverable thereunder for monopolizing, or attempting to monopolize, and acts which are a part of the monopolizing, or attempting to monopolize, are a subject for damages.*

MONOPOLIES 28—RIGHT OF ACTION FOR DAMAGES—PERSONS LIABLE.—Where a company was engaged in a single continuing attempt to secure a monopoly of a particular business, in which attempt different parties joined successively, and by which a competitor was injured, all those joining in the unlawful attempt at different times became liable for whatever injury resulted from the tortious act in which he participated.

MONOPOLIES 28—RIGHT OF ACTION FOR DAMAGES—PERSONS LIABLE.—A party participating in a company's attempt to monopolize a particular business need not expect to profit by his illegal conduct, in order to render him liable.

MONOPOLIES 28—ACTIONS FOR DAMAGES—PLEADING.—In an action for damages, caused by a combination and conspiracy in restraint of the manufacture and interstate sale of coated wire nails, a count containing no description of the trade or of the business situation to which the alleged conspiracy or combination applied, and which did not describe plaintiff's business, or that of defendant, and which contained no allegations that defendant's acts were intended to affect anybody but plaintiff, nor that they were part of any general scheme or conspiracy relating to, and affecting in any broad or substantial manner, the manufacture and sale of such nails, or that they did or could effect such manufacture and sale generally, was insufficient.

Opinion of the Court.

MONOPOLIES 28—PLEADING—ESSENTIALS OF DECLARATION.—In an action against an illegal monopoly for damages under the Sherman Act, the declaration must describe the conditions in the trade in question, the alleged conspiracy or combination, and the business of plaintiff, and the effect thereon of the alleged conspiracy or combination, sufficiently so that the court can see that its acts might have affected the general conditions in the trade, and that plaintiff's business and situation were such that it might have been damaged by its conduct.

At law. Action by the American Steel Co. against the American Steel & Wire Co. and others. On demurrer. Demurrer overruled as to the first count and sustained as to the second count.

McLellan, Carney & Brickley, of Boston, Mass., for plaintiff.

Elbridge R. Anderson, of Boston, Mass., for defendant Baackes.

Samuel D. Elmore, of Boston, Mass., for defendants Ayres and J. C. Pearson Co.

[301] MORTON, District Judge. This is an action for threefold damages under the Sherman Act (26 Stat. 209). The business in question is that of manufacturing and selling coated wire nails. The first count charges a monopoly or attempted monopoly in such manufacture and sale; the second, a combination or conspiracy in restraint of trade in respect thereto. The defendants have demurred; and the question is whether the declaration states a cause of action. It covers, without the annexed exhibits, 74 closely printed pages, and I shall not attempt to restate or summarize it.

As to the first count: This count describes, as I construe it, the following business situation:

A group of men planned to obtain a monopolistic control of the manufacture and first-hand sale of wire nails. To this end, after two abortive attempts, they organized the principal defendant, the American Steel & Wire Co. of New Jersey (hereinafter referred to as the Wire Co.), which secured control of 75 per cent of the entire output of such nails in the United States.

Coated wire nails are made from wire nails by a further process of manufacture, and constitute, evidently, a separate

article of commerce. The Wire Co. (to discuss the case first with reference to it alone and consider the other defendants later), thus producing or controlling three-quarters of all uncoated wire nails, determined to acquire a monopoly in the manufacture and first-hand sale of coated wire nails. The plan which it adopted to accomplish that result was, broadly speaking, to create such difficulties for its competitors—first, in the manufacture, and, second, in the sale, of coated wire nails—as to drive out of the business all of them with whom it was unable to come to terms.

The details of what was done in carrying out this plan varied with different competitors. On the manufacturing side, some were hindered in obtaining their raw material (nails, rods, or wire), and some in obtaining the necessary machinery; some were secretly attacked by bribing their factory employees to disclose their factory conditions, and to send out defective goods, so that their trade was lost; and various other expedients were resorted to, to make manufacture of coated wire nails by the defendant's competitors difficult or impossible. On the selling side, competitors were attacked by bribing their office employees to inform the defendant as to their customers and contracts, and then selling to these customers below cost, and by a general policy of selling below cost when competition developed, until the competitor was forced out of that market, or out of business. Other methods, which it is unnecessary to state in detail, were also used by the Wire Company to hinder and interfere with the sale of coated wire nails by its competitors.

Without particularizing further, it is enough to say that, on the allegations of the declaration, the defendant's conduct and methods were lawless and indefensible. They were adopted, not simply for the purpose of injuring or putting out of business each separate competitor on whom they were practiced, but as coördinated movements in a campaign having as its object the elimination of all effective competition [302]with the defendants in the manufacture and sale of coated wire nails. The result was that, in large and important commercial districts comprising many States, the defendants were successful, and all effective competition was

destroyed. The defendants' campaign was inaugurated years before the plaintiff came into the business; but it was continued thereafter along the same lines, and in pursuance of it the plaintiff was attacked in several of the ways above mentioned, and was damaged.

[1] It is urged for the defendant that an action does not lie under the Sherman Act for unfair business practices, which of course is true. But the first count of the declaration plainly sets up a claim for damages for an illegal monopoly, or an attempted monopoly, in coated wire nails; and the illegal and unfair practices are alleged only in connection therewith, and as part thereof. The thing forbidden by the statute, and for which damages may be recovered, is monopolizing, or attempting to monopolize. These would usually involve—and are here alleged to have involved—many separate acts, each of which, so far as it was part of the monopolizing, or attempt to monopolize, would be forbidden, and therefore a subject for damages under the statute. The defendant had a perfect right, for instance, so far as the Sherman Act goes, to undersell the plaintiff in ordinary business competition, or for the purpose of putting the plaintiff out of business. It had no right to do so as part of a plan to drive everybody out of the trade in order to obtain a monopoly for itself, which is what is alleged. *Swift* v. *United States*, 196 U. S. 375, 396, 25 Sup. Ct. 276, 49 L. Ed. 518; *Monarch Tobacco Works* v. *American Tobacco Co.* (C. C.) 165 Fed. 774. The first count of the declaration states a cause of action against the American Steel & Wire Co. of New Jersey and against Baackes, its vice president, director, and general sales manager.

There remains the further question under this count whether it states a case against the other defendants, viz, J. C. Pearson Company, J. C. Pearson Company (Inc.), and Frank C. Ayres. Ayres was treasurer, director, and general manager of J. C. Pearson Company, he was president of J. C. Pearson Company (Inc.). J. C. Pearson Company (Inc.), succeeded J. C. Pearson Company as selling agent of the Wire Company on June 30, 1913, and has since acted in that capacity. For several years before that date, the relations

between the Wire Company and J. C. Pearson Company were evidently close, though it is not alleged specifically that the latter acted as agent of the former.

[2, 3] The plaintiff began business January 1, 1912, and has continued it up to the present time. During all this period the Wire Company has been carrying out its plan, as above outlined, for monopolizing, or attempted monopolizing, the manufacture and sale of coated wire nails. During the first part of the period J. C. Pearson Company knowingly and actively coöperated with and assisted the Wire Company in so doing. Since June 30, 1913, J. C. Pearson Company (Inc.), has been doing the same sort of thing; all its stock is owned by the Wire Company. Both of the Pearson companies and [303] Ayres, through whom they acted, are alleged to have been engaged in an attempt, various acts in connection with which are set forth in detail, to monopolize the trade in question for the benefit of the Wire Company. There were not successive attempts by the Wire Company to secure a monopoly; there was a single continuing one, in which different parties joined successively, and by which the plaintiff was injured. Everybody who joined in the unlawful attempt became liable for whatever injury resulted from the tortious act in which he participated. *United States* v. *Nunnemacher*, 7 Bissell, 111, 123, Fed. Cas. No. 15,902; *Atlantic & Pacific R. R. Co.* v. *Laird*, 164 U. S. 393, 396, 17 Sup. Ct. 120, 41 L. Ed. 485. It is not necessary that a defendant should expect to profit by his illegal conduct in order to render him liable therefor. *Commonwealth* v. *Harley*, 7 Metc. (Mass.) 462. Whether this count can be supported, as the plaintiff contends, as alleging a conspiracy in restraint of trade, without an explicit allegation to that effect, is doubtful; but, upon the ground stated, it seems to me good against all the defendants.

As to the second count: The second count is founded upon an alleged combination and conspiracy, under the same statute (section 1), among the defendants in restraint of the manufacture and interstate sale of coated wire nails.

[4] This count omits many of what seem to me to be important allegations in the first count. It contains no de-

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scription of the trade or of the business situation to which the alleged conspiracy or combination applied. It does not describe, either the business of the plaintiff, or that of the defendant. There is no allegation that the defendant's acts were intended to affect anybody but the plaintiff, nor that they were part of any general scheme or conspiracy relating to and affecting in any broad or substantial manner, the manufacture and sale of the product in question, nor that they did or could affect generally such manufacture and sale.

[5] It is well settled that a declaration under this section must describe (*a*) conditions in the trade in question; (*b*) the alleged conspiracy or combination; and (*c*) the business of the plaintiff, and the effect thereon of the alleged conspiracy or combination, sufficiently, so that the court can see that the defendant's acts might have affected general conditions in the trade in question, and that the plaintiff's business and situation were such that it might have been damaged by the defendant's conduct.

Applying this test, it is clear that the second count is insufficient. The demurrer to it must be sustained.

Demurrer overruled as to first count; sustained as to second count.

FORD MOTOR CO. v. BENJAMIN E. BOONE (INC.), ET AL.

(Circuit Court of Appeals, Ninth Circuit. August 20, 1917.)

[244 Fed. Rep., 335.]

TRADE-MARKS AND TRADE-NAMES 73(1)—UNFAIR COMPETITION—DECEPTIVE PRACTICES.—Even admitting the so-called agency contracts of plaintiff manufacturer of the Ford car, whereby the so-called agent is required to sell at a fixed uniform list price, and only to persons buying for immediate use, and not for resale, to be invalid, it is unfair competition for defendants, buying them from such an agent and reselling at less than list price, for the purpose of deceiving, to use plaintiff's trade-mark after the manner of a regular Ford agency, and to advertise that they are "Ford agents" and a "Ford auto agency." *

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SALES 457—CONDITIONAL SALES.—A contract between the manufacturer of automobiles and one whom it purports to appoint agent for their sale, in limited territory, and only to users residing therein, and only at list retail price fixed by the manufacturer, and by which it agrees with him that in consideration of his paying 85 per cent of such price, and of his promise to sell only in such territory, and only to a user, and only for such stipulated price, it will consign the cars to him, but will retain title till it shall have received the full consideration, if constituting a sale, constitutes a conditional sale, transferring a qualified title, though the 85 per cent is required to be paid before it parts with possession of the cars; title passing only on compliance with the other conditions constituting part of the consideration.

CONTRACTS 116(7)—CONDITIONAL SALE OF PATENTED AUTOMOBILES—VALIDITY.—Stipulation in sales to retailers by the patentee manufacturer of automobiles by which it retains title till the cars have been resold to a user at a stipulated price is not invalid as between them, as against the public policy; the manufacturer not being in exclusive control of an article of commerce for which there is no substantial substitute, but controlling only one of many similar devices which may be purchased on the open market, and the contract, so far as appears, not interfering with the free play of wholesome competition.

Appeal from the District Court of the United States for the District of Oregon; Robert S. Bean, Judge.

Suit by the Ford Motor Company against Benjamin E. Boone, Incorporated, and others. Bill dismissed, and plaintiff appeals. Reversed, with directions.

[336] *Platt & Platt* and *McDougal & McDougal*, all of Portland, Oreg. (*Alfred Lucking* and *L. B. Robertson*, both of Detroit, Mich., and *Harrison G. Platt*, of Portland, Oreg., of counsel), for appellant.

Littlefield & Maguire, of Portland, Oreg. (*E. V. Littlefield*, of Portland, Oreg., of counsel), for appellees.

Before GILBERT and HUNT, Circuit Judges, and DIETRICH, District Judge.

DIETRICH, District Judge. The plaintiff company is the manufacturer of the Ford automobile. It maintains what it calls an agency for the sale of its cars and extras, and for repair work, at Portland, Oreg. The defendants are engaged in a general automobile business in that city, but have never been authorized by the plaintiff, either as agents or

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otherwise, to sell its products. The suit is brought to restrain them from engaging in what the plaintiff claims to be unfair practices, by which its rights are violated and the public is deceived. Upon the defendants' motion the bill was dismissed in the lower court, and the plaintiff appeals.

Sketching the complaint a little more fully, it shows that for about 12 years last past the plaintiff has been engaged in the manufacture and sale of automobiles invented by it, and commonly known as the "Ford car," "Ford automobile," or "Ford," the same being fully protected by patents; that it has spent large sums of money advertising the "Ford," and by reason of its inherent merit and as a result of such advertising the "Ford" has come into great public favor; that in advertising plaintiff has very generally used two trade-marks duly registered and fully protected by the United States copyright and trade-mark laws, namely, a design known to the trade and the public as the "winged pyramid," which carries in script the word "Ford" above the words "The Universal Car," and also the word "Ford" in script; that in the conduct of its business the plaintiff appoints agents in limited territories throughout the United States, and that the rights and duties of such agents are defined by a uniform contract; that in connection with the signs on their buildings and windows, and their advertising by the use of cards, letter heads, and other printed matter, such agents are required to use the word "Ford" or "Fords" in dress and style resembling such trade-marks or designs, and as a consequence of such common use by the plaintiff and its agents it has come to be understood generally by the public that persons making use of such expressions and designs are duly authorized agents for the sale of the plaintiff's product in the territory where such advertising is used; that, although they are without any authority whatsover from the plaintiff, for the purpose of misleading the public and of fraudulently and unfairly diverting the plaintiff's trade, which belongs to it and its authorized agents, and of causing the public to believe that the defendants are the plaintiff's authorized agents, they, the defendants, have made and are making, and threaten to continue to make, certain false and

misleading representations, particularly in that: First, they maintain in a conspicuous place upon their business building the word "Fords"; second, they have caused to be printed and use certain [337] posters upon oil cans containing automobile oil upon which posters is a winged pyramid, with the script word "Ford" thereon, imitative of the plaintiff's trade-mark, and at the bottom of the poster the words "Benjamin E. Boone & Co., Ford Agents, Portland, Oregon"; third, they falsely and fraudulently represent to prospective purchasers of Ford cars that they are Ford agents, and that they obtain Ford cars in quantity from the plaintiff's factories; fourth, they have caused to be printed in the Portland classified index of the Pacific Telephone & Telegraph Company's directory the following: "Boone, Benj. E. & Co., Ford Auto Agency, 514 Alder St., Main 3966"; fifth, they have importuned certain of the plaintiff's "agents" to breach their "agency" contracts with the plaintiff, and in collusion with such agents they have sent in to plaintiff's factories false and fictitious orders for cars; sixth, they have advertised in the local papers the sale of Ford automobiles which they fraudulently obtained through the plaintiff's agents, at prices greatly below the regular, advertised, retail selling price of the plaintiff's cars.

The significance and materiality of the fifth and sixth specifications depend largely, if not entirely, upon the effect we give to the plaintiff's "agency contract," which the defendants contend is invalid. This contract is of great length, and we refer to such features only as have direct bearing upon the question of its validity. It purports to appoint an "agent" for the sale of the plaintiff's cars and of accessories and parts, and to provide facilities for making repairs. The right of the "agent" to sell is limited to certain defined territory. He may sell cars only to users residing in such territory, and only at the list retail prices fixed by the plaintiff. He must pay 85 per cent of such list price in advance at the time of ordering the cars, and must pay freight charges and other expenses incident to the transportation of the cars from the factory to the agency, as well as taxes and insurance, and must suffer such loss, if any, as is sustained by injury to the cars from the time they leave the factory until

they are delivered to the purchasing user. The 85 per cent cash advance is the full money consideration which the plaintiff receives, but under the terms of the contract it retains complete title until a bill of sale signed by it has been delivered to the vendee, who shall be only a user, that is, one who purchases for immediate use, and not for resale. Additional compensation is provided for the "agent" over and above the 15 per cent of the retail price by way of graduated commissions, depending upon the aggregate amount of sales during the year. The "agent" is required to "maintain on his own account and at his own expense a place of business and properly equipped repair shop, * * * and shall employ competent, efficient salesmen," and the plaintiff is not to be held responsible "for the rent, taxes, wages, or other charges or liabilities of any nature," arising out of or in connection with such business. Provision is also made for advertising and for many other details. The defendants' contention in brief is that, while the instrument is adroitly phrased, for the purpose of giving to the relation between the plaintiff and the other party, whom we shall call the consignee, the appearance of an agency, they in reality stand in the relation to each other of vendor and vendee.

[338] [1] The first question is whether or not, even if we assume the invalidity of the agency contract, the defendants may, in the conduct of their business, engage in the deceptive practices pointed out in the first four specifications. It is too narrow a view to take of the scope of the doctrine of unfair competition to say, as is suggested, that there can be no unfair competition in such case because admittedly the defendants are selling genuine "Ford" cars. If there is no advantage to them and no corresponding disadvantage to the plaintiff, why the pretense of being a Ford agency? The purchase of an automobile is not like the purchase of a sack of potatoes. An automobile is a complex mechanism, designed to be used for an indefinite length of time. Parts wear out and must be replaced. The ordinary purchaser realizes that he is incompetent to judge whether in all respects an offered car is up to the manufacturer's advertised standard. It is a consideration of some importance to him to be able to deal with the maker or its recognized agent. He

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desires the assurance that the article he purchases is standard; that it has the maker's guaranty; that he will be able to procure parts and accessories as he may need them; and, of course, that no question will be raised touching his title. Obviously the defendants could not give a prospective purchaser all of these assurances. If they are rightfully in possession of new "Fords," they may, as a matter of course, sell them where and to whom they please, and as an inducement they may cut the plaintiff's price, but they can not, by pretending to be its agents, thus do it the double wrong of pirating upon its patronage, and also injuring it in the estimation of the public, by making it appear to be actually selling its cars at different prices, while professing to maintain the same price for all. Such deceptive practices are of the very essence of unfair competition.

"A distinctive name of a place of business will be protected as a trade-name against use or imitation by others. Deceptive signs and names upon a place of business or deceptive dress of a store will be enjoined. The right to the exclusive use of a distinctive name or sign in a particular locality may be acquired." 38 Cyc. 826.

It is suggested in their brief that the defendants did not expressly claim or advertise that they were "agents of the Ford Motor Company." It is true that they did not, by advertisement or otherwise, make such claim with precision or in technical language, but such a defense is as common as it is futile. As was said by Mr. Justice Bradley in *Celluloid Mfg. Co.* v. *Cellonite Mfg. Co.* (C. C.) 32 Fed. 97:

"It is not identical with the complainant's name. That would be too gross an invasion of the complainant's rights. Similarity, not identity, is the usual recourse when one party seeks to benefit himself by the good name of another. What similarity is sufficient to effect the object has to be determined in each case by its own circumstances. We may say, generally, that a similarity which would be likely to deceive or mislead an ordinary, unsuspecting customer is obnoxious to the law."

The defendants used plaintiff's trade-mark after the manner of a regular Ford agency. They falsely and with the intent to deceive advertised that they were "Ford agents," and that they are a "Ford auto agency," and for the same purpose they have fraudulently rep[339]resented to prospective purchasers of Ford cars that they were "Ford

agents." Admittedly they resorted to these practices for the purpose of deceiving, and there can be no question that the means employed were well adapted to that purpose. It may be that some people, with knowledge of the actual conditions, would purchase cars from the defendants for $25 below the current price, but, upon the other hand, it may very well be assumed that others would prefer to pay the additional $25 for the assurances and security supposed to attend purchases through a regular agency, and in its enjoyment of the trade which would naturally come to it from this latter class the plaintiff is entitled to protection against the defendants' unfair and deceptive practices.

[2] Passing now to a consideration of the validity of the agency contract: The defendants attach controlling significance to the fact that the consignee must pay the full money consideration before or at the time he receives the cars; the argument being that such payment ipso facto operates to transfer an unqualified title, notwithstanding the express agreement of the parties to the contrary. It is urged that the contract is only an adroit attempt to avoid the effect of certain decisions of the Supreme Court of the United States, such as *Bobbs-Merrill Co.* v. *Straus*, 210 U. S. 339, 28 Sup. Ct. 722, 52 L. Ed. 1086, *Dr. Miles Medical Co.* v. *John D. Park & Sons*, 220 U. S. 373, 31 Sup. Ct. 376, 55 L. Ed. 502, *Standard Sanitary Mfg. Co.* v. *United States*, 226 U. S. 20, 33 Sup. Ct. 9, 57 L. Ed. 107, *Bauer & Cie.* v. *O'Donnell*, 229 U. S. 1, 33 Sup. Ct. 616, 57 L. Ed. 1041, 50 L. R. A. (N. S.) 1185, Ann. Cas. 1915A, 150, and *Straus* v. *American Publishers' Ass'n*, 231 U. S. 222, 34 Sup. Ct. 84, 58 L. Ed. 192, L. R. A. 1915A, 1099, Ann. Cas. 1915A, 369, and that it runs counter to the principles recognized in *Straus* v. *Victor Talking Machine Co.* (No. 374) 243 U. S. 490, 37 Sup. Ct. 412, 61 L. Ed. —, decided April 9, 1917, and perhaps of the companion case, *Motion Picture Patents Co.* v. *Universal Film Co.*, 243 U. S. 502, 37 Sup. Ct. 416, 61 L. Ed. —, decided at the same time. The plaintiff cites, among others, *Bement* v. *National Harrow Co.*, 186 U. S. 70, 22 Sup. Ct. 747, 46 L. Ed. 1058, and *United States* v. *Keystone Watch Co.* (D. C.) 218 Fed. 502, 514. It is to be admitted that the plaintiff, before parting with possession of its cars, requires the pay-

ment by the consignee of the entire money consideration which it expects to receive. Indeed, if the aggregate of the sales consummated by the consignee in a year exceeds a certain amount, the plaintiff is under obligation to return to it a part of the advance payment, by way of commissions. The defendants' contention, however, ignores the fact that there are other considerations deemed by the plaintiff to be valuable, and without the promise of which it would doubtless decline to enter into the contract. It agrees with the consignee that, in consideration of his paying 85 per cent of the list retail price and of his promise to sell only within a certain territory to a user for a stipulated price, it will consign the car to him, but will retain title thereto until it shall have received the full consideration. May the consignee, knowing that the plaintiff will not deal with him unless he executes such a contract, assent to all of such [340] conditions, but with the intention of abiding by only one of them, and, upon the performance of this one, secure the absolute title to the car? If, instead of providing for the consignee's possession as soon as he pays the stipulated amount, it were agreed that the plaintiff should retain possession and deliver only to the purchasing user, could the consignee require delivery to himself, or to a dealer for resale? Or, if, instead of receiving payment of 85 per cent, the plaintiff received but 80 or 84 per cent, with the understanding that the right, and the only right, obtained by the consignee was to have possession of the car, with the power to negotiate a sale thereof to a user, to whom, and to whom only, the plaintiff would be bound to convey the title upon receiving the remaining 5 per cent, or 1 per cent, as the case might be, would there be any doubt of the retention of the title by the plaintiff, with the right to decline to convey to anyone other than the purchasing user? But other considerations are sometimes quite as valuable as the money to be paid for an article.

Admittedly the plaintiff has the right to sell its cars where and to whom it may choose, and for such price as it may see fit. It may decline to deal with the trade at all, and, dispensing with middlemen, sell directly to users, by mail, or through traveling salesmen or local agents. Accordingly it may lawfully appoint an agent at Portland authorized to

sell its cars, limiting his authority to sales within a prescribed territory, and to users, and for a fixed price; and it may impose as one of the conditions of sale that it will not pass title except to the ultimate user and after such price has been paid in full. In short, the plaintiff may lawfully do precisely what it professes to be doing under the existing contract, and the question therefore is not whether its object is legitimate, but whether the means it employs are unlawful or are for some other reason ineffective. Even if it be held that the contract under consideration does not create an agency in the strict sense, but in effect provides for a sale, it is still clearly the understanding of the parties that it is a conditional or restricted sale, and that the title to the cars passes only upon a compliance with the other conditions, as well as that of paying the 85 per cent.

[3] The intent of the parties is clear enough, and the only question is whether effect can be given to such intent. It being a well-recognized principle of law that the vendor may retain title to the thing sold until the full stipulated consideration therefor shall have been paid (*Bailey* v. *Baker Ice Mach. Co.*, 239 U. S. 268, 36 Sup. Ct. 50, 60 L. Ed. 275), it would seem that, if we are to hold the stipulation to that effect in this contract invalid, it must be because under the circumstances of the case such a transaction would be violative of some rule or principle of public policy. But, when the conditions are analyzed, what public interest would be subserved by striking down the contract and thwarting the intent of the parties thereto? As already suggested, it would be entirely possible for the plaintiff to accomplish all the objects which it seeks under the present plan, by marketing its product through its own agencies, so constituted that there could be no doubt that its salesmen were its agents merely, and not vendees. But, were it otherwise, what benefit would result to the public by open[341]ing the door for the bushwhacking competition which, and which only, is likely to follow? It is to be borne in mind that the plaintiff has no monopoly of the automobile business, but only of one out of almost innumerable kinds of cars, all differing in detail one from the other, but of the same general type and all designed to be used in the same general manner, and for the same gen-

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eral purpose. If, as was admitted to be the fact in the Motion Picture Patents Company Case, the plaintiff's car were wholly indispensable to the carrying on of a great industry, and if its plan of marketing were such as to constitute an instrument of oppression or favoritism, then the courts should perhaps be astute to discover means by which to disorganize its system and to encourage competitive effort as between the salesmen or distributors of its product; but such is not the case. Whatever its merits, the Ford car is not, except in the most remotely relative sense, essential to the well-being of the public or any group thereof, or any individual. There are other automobiles in great variety available to anyone who has need and desires to purchase, some cheaper, some more expensive, some less efficient, some more efficient, some less attractive in appearance, others more attractive. *Cole Motor Car Co.* v. *Hurst* (C. C. A. 5th) 228 Fed. 280, 284, 142 C. C. A. 572. Obviously, therefore, the public already has competition to the fullest extent desirable, not a competition entailing the waste of duplication and overlapping effort in marketing the product, with sporadic price cutting of an irrational sort, but the competition of many products, each independently seeking public favor, against one of like character, but slightly different. Is not each manufacturer now under the highest sort of pressure from without? Must it not be alert to discover new improvements and conveniences and to keep down to the minimum the cost of construction and distribution? It is a matter of public knowledge that fortunes are spent in advertising these competitive products, in an effort to attract and cultivate public favor. Under such conditions will the public be benefited by requiring the manufacturer to assume the further burden of internal guerrilla competition, with the confusion and waste entailed thereby? It is futile to say that such a burden will fall not upon the manufacturer or the public, but upon the local dealer or distributor. If there were 10 dealers selling Ford cars in Portland, where there is now but one, would not the expense of marketing be greatly increased, and if, as is contended, the contract under consideration is harsh to the "dealer," does it not follow that, with the trade divided into 10 parts, and with

the expense of rentals and personal service multiplied, the price of the car to the public would increase? Does anyone suppose that such dealers would for any considerable length of time cut the price? In the light of experience is it not so probable as virtually to amount to a certainty that the prices would soon reach a common level, and that level would be higher than the present one? Upon the other hand, will the public not have the benefit of the freest and most effective competition if each patentee manufacturer of automobiles is permitted to market his product in his own way? May it not be assumed that, impelled by considerations of self-interest, he will select the most economical meth[342]od, and that the keen and vigorous competition of innumerable other manufacturers will force him to give to the public the major benefit arising from his economies? At least, we do not think that we would be warranted in holding that the contract here is inherently vicious. If, in fact, it is prejudicial to the public interest because to an unreasonable degree it operates in restraint of trade and interferes with the free play of wholesome competition, the defendants may plead and show the facts.

When we come to consider the decided cases, we find that no decision cited by either party from the Supreme Court of the United States involves the precise question, and that court, it is to be noted, appreciating from an early day the growing complexity of our industrial life and the importance of curtailing the liberty of contract only in so far as positive law or considerations of public policy might from time to time clearly require, has been careful to limit its decisions strictly to the matters directly in issue. *Adams* v. *Burks*, 17 Wall. 453, 21 L. Ed. 700; *Bauer* v. *O'Donnell*, 229 U. S. 1, 33 Sup. Ct. 616, 57 L. Ed. 1041, 50 L. R. A. (N. S.) 1185, Ann. Cas. 1915A, 150. And in reading the cases these considerations should be kept in mind: There is no attempt here to bind the purchasing public by a mere notice attached to the machine, nor is there any claim that a patent is of such force that a violation of the warning or the provisions of a notice of that character constitutes an infringement. If involved at all, the rights of the public are only remotely

affected. The issue is between the patentee manufacturer and the consignee, who have expressly contracted with each other. In the second place, as we have seen, the plaintiff is not in the exclusive control of a useful or desirable article of commerce, whether patented or copyrighted, for which there is no substantial substitute; that is, it is without the power to oppress the public by fixing grossly excessive prices or imposing onerous and unreasonable conditions upon the use of its product. It controls but one of many similar devices which may be purchased upon the open market. In the third place, the plaintiff makes no attempt to restrain trade in unpatented or uncopyrighted articles of commerce by requiring the use thereof upon or in connection with its cars.

That this first consideration has been deemed to be an important one not only appears to be held in other jurisdictions (see Trust Laws and Unfair Competition, issued by the Government Printing Office in 1916, pp. 579, 580, 592, 593, 651, 652), but is abundantly shown by the decisions of the Supreme Court already referred to. In *Adams* v. *Burks*, 17 Wall. (84 U. S.) 453, 21 L. Ed. 700, it was held that, while the purchasers from a patentee had the right to manufacture, sell, and use the patented article only within the limits of a circle of ten miles around Boston, as stipulated in the contract, a purchaser from them of a single patented article acquired the right to use it anywhere. Note, too, the distinction made in *Keeler* v. *Standard Folding Bed Co.*, 157 U. S. 659, 15 Sup. Ct. 738, 39 L. Ed. 848:

"Where the patentee," such is the language of the court, "has not parted, by assignment, with any of his original rights, but chooses himself to make and vend a patented article manufactured, it is obvious that a purchaser can use [348] the article in any part of the United States, and, *unless restrained by a contract with the patentee*, can sell or dispose of the same." (Italics ours.)

And again, after reviewing a number of cases, the court says:

"Upon the doctrine of these cases we think it follows that one who buys patented articles of manufacture from one authorized to sell them becomes possessed of an absolute property in such articles, unrestricted in time or place. Whether a patentee may protect himself and his assignees by special contracts brought home to the purchasers

is not a question before us, and upon which we express no opinion. It is, however, obvious that such a question would arise as a question of contract, and not as one under the inherent meaning and effect of the patent laws."

In *Bobbs-Merrill Co.* v. *Straus*, 210 U. S. 339, 350, 28 Sup. Ct. 722, 726 (52 L. Ed. 1086), it is said:

"In this case the stipulated facts show that the books sold by the appellant were sold at wholesale, and purchased by those who made no agreement as to the control of future sales of the book, and took upon themselves no obligation to enforce the notice printed in the book, undertaking to restrict retail sales to a price of one dollar per copy.

"The precise question therefore in this case is: Does the sole right to vend secure to the owner of the copyright the right, after a sale of the book to a purchaser, to restrict future sales of the book at retail, to the right to sell it at a certain price per copy, because of a notice in the book that a sale at a different price will be treated as an infringement, which notice has been brought home to one undertaking to sell for less than the named sum? We do not think the statute can be given such a construction, and it is to be remembered that this is purely a question of statutory construction. There is no claim in this case of contract limitation nor license agreement controlling the subsequent sales of the book."

In *Bauer & Cie* v. *O'Donnell*, 229 U. S. 1, 33 Sup. Ct. 616, 57 L. Ed. 1041, 50 L. R. A. (N. S.) 1185, Ann. Cas. 1915A, 150, confidently relied upon by the defendants, the issue was expressly defined by the court as follows:

"May a patentee by notice limit the price at which future retail sales of the patented article may be made, such article being in the hands of a retailer by purchase from the jobber, who has paid to the agent of the patentee the full price asked for the article sold?"

And again:

"The real question is whether in the exclusive right secured by statute to 'vend' a patented article there is included the right, by notice, to dictate the price at which subsequent sales of the article may be made."

In *United States* v. *Keystone Watch Co.* (D. C.) decided by Judges Buffington, Hunt, and McPherson, 218 Fed. 502, 514, it was expressly held that—

"As the owner of these patents, the company had the right to make a direct agreement with the jobbers whereby a minimum price was fixed at which the jobbers might sell."

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In stating the issue in one of the two most recent decisions (the *Motion Picture Patents Company Case*, *supra*), Mr. Justice Clark, speaking for the court, said:

"It is obvious that in this case we have presented anew the inquiry, which is arising with increasing frequency in recent years, as to the extent to which a patentee or his assignee is authorized by our patent laws to prescribe by [844] notice attached to a patented machine the conditions of its use, and the supplies which must be used in the operation of it under pain of infringement of the patent."

The case is also in striking contrast with what we have here, by reason of the fact that the plaintiff's patented device "is the only one with which motion-picture films can be used successfully," and for the further reason that after the device was sold and paid for it continued to be subject not only to a restriction as to supplies which could be used with it, but to "conditions as to use or royalties which the company which authorized its sale might see fit after the sale from time to time to impose." Commenting upon this feature, the court said:

"The perfect instrument of favoritism and oppression which such a system of doing business, if valid, would put into the control of the owner of such a patent, should make courts astute, if need be, to defeat its operation. If these restrictions were sustained, plainly the plaintiff might, for its own profit or that of its favorites, by the obviously simple expedient of varying its royalty charge, ruin anyone unfortunate enough to be dependent upon its confessedly important improvements for the doing of business."

In the *Victor Talking Machine Case*, *supra*, the court said:

"The abstract of the bill which we have given makes it plain: That whatever rights the plaintiff has against the defendants must be derived from the 'license notice' attached to each machine; for no contract rights existed between them."

The question in the *Standard Sanitary Manufacturing Co. Case*, as well as in *Straus* v. *American Publishers' Association*, was whether or not a combination of 80 per cent of all the manufacturers of enameled ware or of 75 per cent of all the publishers of books, copyrighted and uncopyrighted, for the purpose of fixing prices and eliminating competition, was exempt from the operation of the Anti-Trust laws merely because enameling is a patented process, and some of the

books published were protected by copyright. Clearly no such question arises here. Were the plaintiff in a combination with 75 or 80 per cent of the manufacturers of automobiles, for the purpose of fixing prices and restricting competition, we would have a similar case. The chief reliance of defendants seems to be upon *Dr. Miles Medical Co.* v. *Park & Sons Co.*, 220 U. S. 373, 31 Sup. Ct. 376, 55 L. Ed. 502. The complainant there was engaged in the manufacture and sale of proprietary medicines, prepared by means of secret formulas, but touching which there was no patent or other statutory grant. It adopted an intricate system for maintaining uniform prices to the retail as well as to the wholesale trade. In the respect in which the case has a bearing upon the question here under consideration, it may best be distinguished by the following excerpt quoted from the opinion:

"The first inquiry is whether there is any distinction, with respect to such restrictions as are here presented, between the case of an article manufactured by the owner of a secret process and that of one produced under ordinary conditions. The complainant urges an analogy to rights secured by letters patent. *Bement* v. *National Harrow Company*, 186 U. S. 70 [22 Sup. Ct. 747, 46 L. Ed. 1058]. In the case cited there were licenses for the manufacture and sale of articles covered by letters patent with stipulations as to the prices at which the licensee should sell. The court said, referring to the [345] act of July 2, 1890 (pages 92, 93): 'But that statute clearly does not refer to that kind of restraint of interstate commerce which may arise from reasonable and legal conditions imposed upon the assignee or licensee of a patent by the owner thereof, restricting the terms upon which the article may be used and the price to be demanded therefor. Such a construction of the act, we have no doubt, was never contemplated by its framers.'

"But whatever rights the patentee may enjoy are derived from statutory grant under the authority conferred by the Constitution. This grant is based upon public considerations. The purpose of the patent law is to stimulate invention by protecting inventors for a fixed time in the advantages that may be derived from exclusive manufacture, use, and sale."

It may be noted that the passage here quoted from *Bement* v. *National Harrow Company*, was subsequently again approved in the *Standard Sanitary Manufacturing Company Case*, *supra*.

Opinion of the Court.

By drawing attention to the fact that the plaintiff's automobile here is covered by letters patent, we do not intimate the view that the patents of themselves would be a sufficient basis upon which to grant the relief sought. As has been frequently held, the statutes conferring exclusive rights upon the patentee do not of their own vigor perpetuate such rights indefinitely, and therefore an unconditional sale of a patented article releases it from the patentee's control. So, going a step further, the patentee can not unconditionally sell the article patented, and by attaching a notice thereto so extend the scope of the patent as to enable him successfully to claim that a violation of the provisions of the notice constitutes an infringement of his statutory right, as was the contention in the "Sanatogen" Case (*Bauer* v. *O'Donnell*). The plaintiff here makes no such claim. It is asserting only the right, to be exercised within such limits as may be prescribed by statutory law or considerations of sound public policy, expressly to contract with the person to whom it delivers possession of its patented product to reserve to itself a measure of the absolute ownership and control with which admittedly it is invested. So far as we are advised by the contract, and that is all that we have before us, the plaintiff's system of selling its cars can not be made the means of laying an unreasonable restraint upon the free play of competition or of dealing oppressively with the public. Presumably the contract was adopted in good faith, to accomplish an object which apparently is in itself legitimate. It is of no present interest that in some of its provisions it may be harsh, or even unenforceable as against the consignee; he is not complaining. If he desires to withdraw from the relation, that is his right, but he can not at the same time claim all the benefits of the contract and repudiate its burdens.

The objection that the complaint is insufficient to disclose jurisdiction in the court below we have considered, but it is deemed to be without merit.

The judgment will be reversed, with directions to overrule the motion to dismiss, and to take further proceedings not out of harmony with the views hereinbefore expressed.

Statement of the Case.

IN THE MATTER OF THE APPLICATION OF GREAT EASTERN CLAY PRODUCTS COMPANY.

(District Court, S. D. New York. March 2, 1915.)

[Not reported.]

OFFICER OF EXECUTIVE DEPARTMENT—PRODUCTION OF DOCUMENTS—PROCESS.—A Federal court will not entertain process, in a suit between private parties, to compel the production before an examiner, by an officer of an executive department of the Government, of papers coming into his possession as such officer in the discharge of his official duties.*

IMMUNITY—SUIT BETWEEN PRIVATE PARTIES.—A witness, in a suit between private parties, can not be given immunity under the Federal statutes so as to bind the Department of Justice.

PRACTICE—DOCUMENTS—PRODUCTION OF, UNDER SUBPŒNA.—Where a witness produces documents under subpœna, each document so produced goes direct to the court and will not be seen by the counsel compelling its production, unless and until the court has held it to be admissible.

Contempt proceedings against Mark Hyman, a special assistant to the Attorney General of the United States, and J. Julian Hall, to compel the production before an examiner before whom depositions were being taken, of certain papers then in the possession of Hyman, and which had come into his possession as such officer in the discharge of his official duties. Process denied as to Hyman, but granted as to Hall.

Complaint having been filed with the Department of Justice that the National Fire Proofing Company and others were in a combination in restraint of trade, an investigation was undertaken by the Department of Justice. In the course of this investigation a special agent of the Department of Justice interviewed several witnesses and received from them certain documents material to the question of whether a combination in restraint of trade existed. Thereupon an investigation was instituted before the grand jury in the Southern District of New York, in the course of which investigation

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* Syllabus by the compilers.

Statement of the Case.

certain of the documents so obtained by the special agent were read in evidence before the grand jury. The grand jury term ended before the completion of the investigation, and no further proceedings were instituted.

Prior to the beginning of the Government investigation, a suit had been filed in the District Court of the United States for the Northern District of Ohio by the Great Eastern Clay Products Company against the National Fire Proofing Company for triple damages, in which it was alleged, in substance, that the National Fire Proofing Company was attempting to monopolize and had monopolized interstate trade in clay products, and that in the course of its monopolization it had coerced the Great Eastern Clay Products Company to sell its competing plant to the National Fire Proofing Company at a greatly reduced price. Issues having been joined in the triple damage case, the plaintiff started to take depositions and in the course of these depositions learned that many of the documents material to its case were in the possession of Mark Hyman, a special assistant to the Attorney General and in charge of the investigation on behalf of the Government. The plaintiff thereupon applied to said Hyman for access to said documents, and was informed that these documents were obtained by the Department of Justice for Government use, and that it was contrary to the rules of the department to permit either party in a private controversy to have access to them, but that the department would take due steps to have these documents photographed, and thereupon would return them to the witnesses from whom they were obtained.

The plaintiff, however, desiring immediate access to the documents, served a subpœna *duces tecum* upon Mark Hyman to produce these documents before an examiner in the Southern District of New York. Mark Hyman appeared before the commissioner and respectfully declined to produce them because of the aforesaid instructions from the Department of Justice. Thereupon, the plaintiff instituted complaint proceedings against him and against J. Julian Hall, one of the witnesses from whom the documents were obtained.

Statement of the Case.

The proceedings came on before Judge Hough on December 18, 1914, who dismissed them as to Hall, because the papers were not in his custody, and as to Hyman, because the court had no power to interfere with the determination of the Department of Justice in the matter, saying:

HOUGH, D. J.

"I utterly decline to recognize the power of this or any other court to coerce, or interfere with, or compel action by virtue of subpœna, either personal or *duces tecum*, as to any of the great officers of the Federal Government or the great executive officers of any of the States. Such matters are not judicial, they are political. Governmental officers may seriously interfere with the administration of private justice; they frequently do; but if you begin to endeavor to subject (for example) Cabinet officers (or their authorized deputies acting under authority of such Cabinet officers) to the ordinary processes of the courts in times of stress and difficulty, there the door is opened to paralyze the powers of the Government.

"It is no answer, that in times of peace when nobody is called upon to suffer except a few private citizens from what is often tyranny; it seems easy to make even such officers amenable to the ordinary writs of the court.

"I have already twice refused to exercise, or permit the effort to exercise, the powers of the court as shown by a subpœna against the Cabinet departments—once upon the Department of the Interior, and once the Department of War.

"It is undoubtedly true that circumstances may arise; they have arisen in other cases, and they may exist here, where the power of one of the great officers of the United States Government is used to defeat the ends of justice between private parties. It is not for me or this court in any proceeding of this kind to investigate such matter or impute such motive.

"It is a matter, in my judgment, of public policy, so overwhelming in its nature, that even where my own personal feelings may be that an injustice is being committed, the remedy for the injustice is not to seek to make a court interfere with what an officer of the Government considers to be his official duty, but to go to that officer—and by that officer I mean the head of the department to which that officer belongs—and rely upon him to do that which a good citizen ought to do. If he refuses, as I have stated before, the remedy is not judicial, but political."

Thereafter, after photographing the documents, Hyman tendered them back to Hall, who declined to receive them, and a second contempt proceeding was accordingly instituted.

Opinion of the Court.

Clifton P. Williamson, of New York, and *W. D. Turner*, of Cleveland, Ohio, for the plaintiff.

Herbert C. Smyth, of New York, for the witness Hall.

H. Snowden Marshall, United States attorney, and *Mark Hyman*, special assistant to the Attorney General, for the Government.

LACOMBE, C. J.: This is a proceeding intended to secure the production of certain documents before an examiner who is now taking testimony here to be used in an action to be tried in Ohio. The action is for treble damages under section 7 of the Anti-Trust Act. The documents are now in the custody of officers of the Department of Justice, who are ready and willing to return them to the person from whom they took them, the respondent Hall. The present proceedings are directed, the one against the special assistant to the Attorney General who now has the documents; the other against Hall himself.

As to the special assistant, I concur with Judge Hough that process to compel him to produce the documents will not be entertained.

So far as Hall is concerned, he is now in a position where he can repossess himself of his documents without entering into any bargain with any one about them. He should take back his documents and thus put himself in a position to obey the subpœna.

It is objected to their production that the witness may avail himself of his constitutional privilege—he contends that he may be prosecuted under the Federal, or the State Anti-Trust Laws. In answer to this it is suggested that he may be given immunity. I do not see how he can be given immunity under the Federal statutes in this action, which is one brought by a private person. It would open the door to great abuses if counsel in a private suit, or even the judge before whom such suit was tried could give immunity, so as to bind the Department of Justice. However, these questions are not now here for decision. Each document will be disposed of separately; when produced in response to the subpœna it goes direct to the court and will not be seen by the counsel who has brought it out of the hands of an unwill-

ing witness, unless and until the judge shall have disposed of all questions as to its admissibility, including privilege.

Motion denied as to Hyman.

Motion as to Hall granted to the extent of requiring him to repossess himself of all documents which the Department of Justice took from him and now offers to return him free of all restrictions and bring them to court.

IMPERIAL FILM EXCH. v. GENERAL FILM CO. ET AL.

(District Court, S. D. New York. Dec. 14, 1915.)

[244 Fed. Rep., 985.]

CORPORATIONS 617(1)—DISSOLUTION—EFFECT.—The dissolution of a corporation is equivalent to the death of a natural person.[a]

MONOPOLIES 28—INJURIES—ACTION.—An action under Sherman Anti-Trust Act July 2, 1890, c. 647, § 7, 26 Stat. 210 (U. S. Comp. St. 1916, § 8829), for treble damages for injuries to person or property by reason of unlawful monopoly, is one for a personal wrong, and sounds in tort.

COURTS 339—FOLLOWING STATE LAWS—ABATEMENT AND REVIVAL.—Local state statutes in respect to abatement and survival of actions have no application to an action depending solely upon a statute of the United States.

ABATEMENT AND REVIVAL 49—SURVIVAL—COMMON LAW.—Where there is no Federal statute, either preventing or permitting the survival of an action depending solely on a Federal law, the rules of common law, which include judicial opinions, even the most modern, on points not regulated by statute, must be looked to, to determine whether the action survives.

ABATEMENT AND REVIVAL 57—SURVIVAL—COMMON LAW.—An action for treble damages, brought under Sherman Anti-Trust Act, § 7, based on combinations in restraint of trade, survives the death of [986] the person or dissolution of a corporation injured, being an action for injuries to property, which might have been assigned; the modern rule being in favor of assignment of actions, and tort actions for injuries to property which were assignable surviving.

ABATEMENT AND REVIVAL 73—CORPORATIONS—REVIVAL OF ACTION—PARTIES.—Where, on dissolution of a corporation, the State court appointed a trustee, who was in all respects the equivalent of an assignee, such trustee may be substituted as plaintiff in an action previously instituted by the corporation to recover treble damages under Sherman Anti-Trust Act, § 7, for injuries occasioned by a violation of the act.

Opinion of the Court.

At Law. Action by the Imperial Film Exchange against the General Film Company and others to recover treble damages under Sherman Anti-Trust Law, § 7. On motion by one appointed trustee of the property of plaintiff corporation to be substituted as party plaintiff. Motion granted.

Plaintiff is a New York corporation, which, pursuant to the General Corporation Law of that state (Consol. Laws, c. 23), applied for voluntary dissolution. The application was granted, and on May 20, 1913 (after the institution of this suit), an order was entered in the Supreme Court reciting that the plaintiff herein was insolvent, and that it would be for the benefit of its stockholders that it be dissolved; whereupon it was "ordered that the said corporation, Imperial Film Exchange, be and it hereby is dissolved." The order then proceeded to appoint Mr. Joseph R. Truesdale "permanent receiver of all the assets and property of said corporation, with all the powers conferred by law on permanent receivers." The statute above referred to (section 231 et seq.) provides that permanent receivers of New York corporations in dissolution "shall be trustees of the property [of the corporation] for the benefit of the creditors of the corporation and of its stockholders," and also that such receivers shall be "vested with all the property real and personal of the corporation," etc. Mr. Truesdale then moved in this count to be substituted as plaintiff herein and to amend the complaint in an appropriate manner. This motion is opposed on the ground that the right of action set forth in the complaint died with the death (i. e., the dissolution) of the plaintiff corporation; that therefore the action abated, and can not now be revived, because the cause of action itself did not survive the dissolution aforesaid.

Laurence A. Sullivan and *Eugene M. Gregory*, both of New York City, for receiver.

Harold Nathan, of New York City, for defendants.

Hough, District Judge. The exact point of law raised by this motion has never been decided, nor, indeed, so far as my own investigations and those of counsel reveal, has it ever been mooted before. The very able and interesting briefs of counsel I have considered a long time, and yet after such lengthy reflection it appears to me that the matter must be

decided by one's views of some elementary and fundamental propositions. To put the matter in another way, decision must be here arrived at, not by a nice consideration of closely joining decisions, but by the view entertained of the application of certain broad propositions, concerning the general correctness of which certainly no counsel here concerned could entertain any doubt. Defendants' position may, I think, be fairly outlined thus:

[1] 1. The dissolution of the plaintiff is equivalent to the death of a natural person. To this I agree, and consider the references made [987] in argument entirely sufficient, viz: *Greeley* v. *Smith*, 3 Story, 657, Fed. Cas. No. 5748; *Pendleton* v. *Russell*, 144 U. S. 640, 12 Sup. Ct. 743, 36 L. Ed. 574; *Matter of Stewart*, 39 Misc. Rep. 275, 79 N. Y. Supp. 525; Id., 40 Misc. Rep. 32, 81 N. Y. Supp. 209; Id., 86 App. Div. 627, 83 N. Y. Supp. 1117; Id., 177 N. Y. 558, 69 N. E. 1131.

[2] 2. The cause of action set forth in the complaint herein (or any cause of action properly brought under section 7 of the Sherman Act) is certainly for a personal wrong, and therefore an action for tort. I agree to this as far as it goes, but do not think that it states the whole truth.

[3] 3. Since this suit depends for its vitality solely upon a statute of the United States, the statutes of the state of New York in respect of abatement and survival of actions or causes of action have no application. To this I agree, upon the authority of the cases cited: *Michigan Central, etc., Co.* v. *Vreeland*, 227 U. S. 59, 33 Sup. Ct. 192, 57 L. Ed. 417, Ann. Cas. 1914C, 176; *Baltimore & Ohio R. R.* v. *Joy*, 173 U. S. 226, 19 Sup. Ct. 387, 43 L. Ed. 677.

[4] 4. There is no statute of the United States either preventing or permitting the survival of such a cause of action as this. Therefore the rules of the common law become applicable. Holding common law to include also judicial opinions, even the most modern, on points not regulated by statute, I agree to this.

[5, 6] 5. The dissolution (i. e., death) of this plaintiff corporation must have wholly abated this action, because the action is for tort, and the common-law rule regarding the death of personal actions still applies. To this conclusion I

cannot agree, because of what I conceive to be the half truth heretofore alluded to. Such an action as this under the Sherman Law can only be brought when a person is "injured in his business or property." Section 7. The action is to recover "threefold the damages by him sustained"; i. e., sustained by and in the said "business" or "property."

Such an action as this might well be called sui generis, but surely the nearest approach to one of the old legal categories that can be made is to assign this new statutory cause of action to that of actions for a tort occasioning injury to property, of which perhaps the most ancient and familiar illustrations are trespass q. c. f. and trespass d. b. a. By a long list of decisions the general test of survivability of actions is their assignability. In fact, many, if not most, of the cases seem to reason in a circle; i. e., if the question is of assignability, a case of survival is thought to rule it, and e converso. See such decisions catalogued in 4 Cyc. 23. In short, assignability and the right of survival are attributes of causes of action discoverable by the same tests; as a general rule they are "convertible terms." *Selden* v. *Ill. Trust, etc., Bank*, 239 Ill. 67, 87 N. E. 860, 130 Am. St. Rep. 180; *Tanas* v. *Municipal Gas Co.*, 88 App. Div. 251, 84 N. Y. Supp. 1053; *Morenus* v. *Crawford*, 51 Hun, 89, 5 N. Y. Supp. 453; *Grocers' National Bank* v. *Clark*, 48 Barb. (N. Y.) 26.

Admitting that most actions for wrong to the person, or indeed to a person, are still subject to the common-law rule, it is several cen[988]turies since an exception was established (in the language of Story) that:

"Vested rights ad rem and in re, possibilities coupled with an interest, and claims growing out of and adhering to property may pass by assignment." *Comegys* v. *Vasse*, 1 Pet. at 213, 7 L. Ed. 108.

Sometimes this rule is covered up or disguised by an assignment of the property injured, as in *Tome* v. *Dubois*, 6 Wall. 548, 18 L. Ed. 943, where the defendant had wrongfully deprived the plaintiff's assignor of a quantity of saw-logs. The assignor sold the saw-logs to the plaintiff, though he had no possession of them, and the plaintiff maintained an action for conversion. In New York, not merely such property might have been assigned, together with the cause of action growing out of it, but the cause of action itself might have been directly assigned. *Richtmeyer* v. *Remsen*, 38 N. Y. 206.

Opinion of the Court.

Assuming that the cause of action set forth in this complaint, being statutory, is *sui generis*, the Congress has not prescribed whether said cause of action may be assigned or not. In the absence of such permission or prohibition, the question of assignability of rights conferred by statutes is to be governed by the general principles regulating that quality in choses in action in general. The general rule was laid down in *Meech* v. *Stoner*, 19 N. Y. 26, when Comstock, J., said, in speaking of the right to assign a claim under the statute for money lost at gambling:

"The assignability of things in action is now the rule; non-assignability the exception; and this exception is confined to wrong done to the person, the reputation, or the feelings of the injured party, and to contracts of a purely personal nature, like promises of marriage." 19 N. Y. 29.

Therefore, if this be regarded merely as a statutory claim, it is of such a nature as to be assignable. The chose in action alleged to exist in the complaint is undoubtedly property in the largest sense of that word, the test whereof is that it could by appropriate process be reached by the creditors of the Imperial Film Exchange. I do not think it open to doubt that a judgment creditor of this plaintiff could by proceedings supplementary to execution procure the appropriation of this cause of action to himself in satisfaction of his judgment. This is enough to prove that it is property.

The Supreme Court of the state by its order has, in obedience to the statute, preserved and handed on to Mr. Truesdale, as trustee, all the property of this plaintiff; that is, it has taken possession of everything that the plaintiff could have assigned and everything that the creditors of the plaintiff could hope to reach, either at law or in equity. This lawful action of the court having supervision of this corporation is the equivalent (at least) of an assignment.

Because, therefore, the permanent receiver, Mr. Truesdale, is the equivalent of an assignee, because the cause of action is capable of assignment, and Mr. Truesdale has become the owner of it, I regard the legal death of the corporation as an immaterial element in this application. Therefore the motion is granted.

Opinion of the Court.

JESSE T. LOWN *v.* UNDERWRITERS' ASSOCIATION OF THE DISTRICT OF COLUMBIA AND HOME INSURANCE COMPANY OF NEW YORK.

(Supreme Court, District of Columbia, June 23, 1915.)

[Not reported.]

COMBINATION—FIRE INSURANCE—"TRADE" AND "COMMERCE"—DISTRICT OF COLUMBIA.—The words "trade" and "commerce," as used in the Sherman and the Clayton Acts, do not apply to the business of fire insurance in the District of Columbia.[a]

In equity. Suit by Jesse T. Lown, to restrain the defendants, the Underwriters' Association of the District of Columbia, and the Home Insurance Co., of New York, under section 16 of the Clayton Act [Act Oct. 15, 1914 (38 Stat., 730)], from fixing rates for fire insurance in the District of Columbia. Injunction denied, and bill dismissed.

McCOY, Judge. The issuing of a policy of insurance is not a transaction of commerce within the meaning of the clause of the Constitution which provides that Congress shall have the power to regulate commerce with foreign nations and among the several States. *Paul* v. *Va.*, 8 Wall., 168; *Hooper* v. *Cal.*, 155 U. S., 648; *New York Life Insurance Co.* v. *Cravens*, 178 U. S., 389.

There is nothing in the Sherman Act or the supplement thereto of October 15, 1914, which indicates that the words "trade" and "commerce" were used as applying to transactions other than those which Congress has power to regulate under the provision of the Constitution above referred to; consequently those acts can not be held to apply to the business of fire insurance in the District of Columbia.

The motion for injunction is denied, and the bill dismissed, with costs.

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[a] Syllabus by the compilers.

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